Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

vs.

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER
FOR PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, CHARLES VAUGHAN
AND JAMES PETERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Robert E. Sutton
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

Attorney for Petitioners

56 pp

QUESTIONS PRESENTED

1. Are non-media defendants who are claimed to have defamed a "limited purpose" public figure entitled to the "actual malice" heightened protection of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) and its progeny?

2. May a federal court of appeals establish a heretofore undetermined qualified privilege under a state common law of defamation and require a plaintiff to meet the "actual malice" test set forth in New York Times v. Sullivan and its progeny in order to prove abuse of the qualified privilege?

3. Does repetitious sale and presentation of a defamatory videotape satisfy the "actual malice" requirement of New York Times v. Sullivan and its progeny?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Ralph Underwager and Hollida Wakefield, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 25, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated April 25, 1994 sustaining the decision of the United States District Court for the Western District of Wisconsin is reported at 22 F.3d 730 (7th Cir. 1994) and is reprinted at pp. A-1 to A-11 of the Appendix to this Petition. The underlying opinion of the United States District Court for the Western District of Wisconsin dated June 4, 1993 is reprinted at pp. A-12 to A-17 of the Appendix to this Petition. The prior opinion of the United States District Court for the Western District of Wisconsin dated April 6, 1993 is reprinted at pp. A-18 to A-24 of the Appendix to this Petition.

JURISDICTION

The United States District Court for the Seventh Circuit issued its decision on April 25, 1994 affirming the decision of the United States District Court for the Western District of Wisconsin. The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the first amendment of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the government for a redress or grievances."

STATEMENT OF THE CASE

Ralph Underwager, Ph.D. is a Minnesota resident and a licensed psychologist.

Hollida Wakefield is a licensed psychologist and the Administrator for the Institute of Psychological Therapies in Northfield, Minnesota.

The American Prosecutors Research Institute (APRI) is a non-profit research organization affiliated with the National District Attorneys Association with offices in Virginia.

Anna Salter is a psychologist and a resident of New Hampshire.

Mike Munro is a resident of Sydney, Australia and a reporter for the television program "60 Minutes" of Australia. During the summer of 1990 Mr. Munro conducted interviews in connection with preparing a television program for "60 Minutes" of Australia entitled "Witness for Mr. Bubbles." Munro conducted the interviews in New Guinea, Australia, Washington, D.C., New York, Virginia, Minnesota and Indiana. No interviews were conducted in Wisconsin. Munro was never in Wisconsin.

The "Witness for Mr. Bubbles"[1] program was telecast on the Nine Network in Australia on August 5, 1990. It was never again broadcast by the Nine Network. "60 Minutes" of Australia did not formally distribute the videotape for rebroadcast outside of Australia or make it available to other markets. A copy of the video cassette of the "Mr. Bubbles" program was obtained by Patricia Toth, the Director of the National Center for Prosecution of Child Abuse and she played

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[1]A videotape of the program has been submitted to this Court with this petition. Copies were also submitted to the District Court and Court of Appeals below.

that videotape at the Midwest Conference on Child Sexual Abuse and Incest at Madison, Wisconsin on October 31, 1990. Between December 1, 1991 and January 1, 1993 Toth republished the videotape at conferences throughout the United States on thirteen occasions; in Alabama, Virginia, Ohio, Illinois, Washington, D.C., Indiana, Oregon, Maryland, North Dakota, and Texas.

Anna Salter was also present and a speaker at the Midwest Conference on Child Sexual Abuse and Incest at Madison, Wisconsin in October, 1990. In November, 1990 Mimi Rose, also an employee and agent of the National Center for Prosecution of Child Abuse played the videotape at a conference in Illinois and in 1991 Mimi Rose played the videotape at a conference in Arizona.

James Peters, Anna Salter, and Charles Vaughan all are interviewed during the videotape and make defamatory statements concerning the petitioner, Dr. Ralph Underwager.

In the spring of 1988 Anna Salter proposed to the New England Association of Child Welfare Commissioners and Directors to develop a bibliography on child sexual abuse, interviewing skills, and rebuttal materials. Salter decided to concentrate on the books written by the plaintiffs Underwager and Wakefield, i.e. Accusations of Child Sexual Abuse (1988) and The Real World of Child Interrogations (1990). She authored a monograph entitled "ACCURACY OF EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES: A Case Study of Ralph Underwager and Hollida Wakefield." This unpublished monograph has been widely circulated; Salter sent a copy to the National Center for Prosecution of Child Abuse, which has made it available to prosecutors and other interested persons. The monograph is highly critical of the 1988 book and of Ralph Underwager's testimony. The monograph states that the Underwager, Wakefield book misrepresents the studies, rips quotations from their context (and misleadingly redacts them), attributes to scholars positions they once held but have repudiated in light of more recent research and ignores evidence

contradicting its thesis. During her interview on the "Witness for Mr. Bubbles" video program Salter accuses Underwager of distorting facts, providing false testimony and presenting "gobblygook" unsupported by scientific evidence. Anna Salter obtained a copy of the "Mr. Bubbles" videotape and distributes copies from her office for a fee to interested persons.

In the James Peters' portion of the "Witness for Mr. Bubbles" video James Peters asserts that Underwager is dangerous, has lied under oath, and that "....a lot of children have suffered at his hands. Children who have probably been abused have been put back into situations where they're likely to have been molested again."

Charles Vaughan in his portion of the "Witness for Mr. Bubbles" video interview asserts that "....Underwager must have trouble sleeping" and that Underwager used an erroneous theory that a child was delusional in accusing her father of sexual abuse and that the child was doing a favor for the mother.

Mike Munro, the moderator of the "Witness for Mr. Bubbles" videotape endorses and repeats the defamations made concerning Dr. Ralph Underwager throughout the entire program.

On March 19, 1992 petitioners filed a complaint in the United States District Court for the Western District of Wisconsin against the defendants under diversity jurisdiction using the playing of the Mr. Bubbles tape at the Midwest Conference as the actionable event. They named eleven defendants: Anna Salter, Patricia Toth, Mike Munro, National Center for Prosecution of Child Abuse, American Prosecutors Research Institute, National District Attorneys Association, Channel 9 Australia, "60 Minutes" of Australia, Mimi Rose, Charles Vaughan, and James Peters. The National Center for Prosecution of Child Abuse was dismissed as a "project" of the American Prosecutors Research Institute because it was not a juridical entity and could not be sued. Channel 9 Australia and "60 Minutes" of Australia and Munro were subsequently dismissed by stipulation. The District Court dismissed Rose,

Vaughan, and Peters because they had insufficient contacts with Wisconsin. The judge granted summary judgment in favor of the American Prosecutors Research Institute and the National District Attorneys Association because they had nothing to do with the defamation of which plaintiffs complained.[2]

The defendants Salter and Toth moved for summary judgment and after the discovery and submission of affidavits and briefs the District Court initially, by decision dated April 6, 1993, denied the motions. (App. 18 - 24) Upon motions for reconsideration and additional submissions the District Court reversed its April 6, 1993 decision and granted summary judgment to Toth and Salter by Memorandum and Order dated June 4, 1993. (App. 12 - 17)

Plaintiffs timely appealed the grant of summary judgment to the defendants Salter, Toth, American Prosecutors Research Institute, and National District Attorneys Association and the dismissal of the defendants Rose, Vaughan, and Peters to the United States Court of Appeals for the Seventh Circuit. The appeal was argued on December 10, 1993 and the decision rendered on April 25, 1994. (App. 1 - 17)

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE DECISION BELOW IS AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO

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[2] This statement of the case is partially taken from the opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Western District of Wisconsin. See App. 1 - 24

DECIDE WHETHER OR NOT THE "ACTUAL MALICE" HEIGHTENED PROTECTION OF NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. CT. 710, 11 L. Ed. 2d 686 (1964) AND ITS PROGENY IS TO BE AFFORDED NON-MEDIA DEFENDANTS.

Justice Brandeis dissenting in Adams v. Tanner, 244 U.S. 590, 600, 61 L. Ed. 1336, 37 S. Ct. 662 (1917):

"Ex facto jus oritor.[3] That ancient rule must prevail in order that we may have a system of living law." Quoted with approval by Justice Stevens in Bose Corp. v. Consumers Union of U. S., Inc., 466 U. S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 @ 522 fn. 27 (1984).

"....But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advance society's interest in 'inhibited, robust, and wide open' debate on public issues. New York Times v. Sullivan, 376 U.S. at 270. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)" Mr. Justice Powell in Gertz v. Robert Welch, Inc., 418 U.S. 323 at p. 340, 94 S. Ct. 2993,41 L. Ed. 2d 789 (1974).

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[3]"The law arises from the facts."

The discrete defendants that remained in the case at bar, after the stipulation dismissing Channel Nine Australia, "60 Minutes" of Australia, and Mike Munro, were all non-media defendants.[4] Although the parties had joined issue early on in the District Court on the question of whether or not the non-media defendants were entitled to the heightened protection of the "actual malice" test the District Court avoided answering the question in its initial Memorandum and Order of April 6, 1993 because he concluded that the issue of whether or not the defendants published the statements with "actual malice" was a factual issue remaining for trial. ("Factual issues remain for trial concerning the truth of the alleged defamatory statements and whether or not the defendants published the statements with actual malice. Accordingly, the defendants' motions for summary judgment will be denied.") (App. 23) When the District Court reversed its position in its Memorandum and Decision of June 4, 1993 it, curiously, did not directly revisit or in any way advert to the question of whether or not non-media defendants were entitled to the "actual malice" standard. (App. 12 - 17) Of course, by implication the court decided that the non-media defendants were entitled to the protection because the decision analyzed the submissions in light of the "actual malice" test. ("Both defendants have moved for reconsideration contending that no factual issue remains for trial concerning

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[4]Even had the Australian defendants remained, since the program was produced and initially published in a foreign country, those non-resident aliens might well not have been entitled to the heightened protection of New York Times v. Sullivan. Mr. Justice Douglas in Bridges v. Wixon, 65 S. Ct. 1443, 326 U.S. 135, 89 L. Ed. 2103 (1945) noted "Freedom of speech and press is afforded aliens residing in this country....." (Emphasis supplied) 326 U.S. @ 148. By implication such protections may not be afforded non-resident aliens.

actual malice"). (Emphasis supplied) (App. 12) Nonetheless, the District Court did not directly address the issue. (App. 12 - 17)

On appeal to the United States Court of Appeals for the Seventh Circuit the parties again exhaustively briefed the question of non-media defendants' entitlement to "actual malice" protection under New York Times and its progeny. The case was venued in Wisconsin and, coincidentally, the Wisconsin Supreme Court had specifically addressed the question and concluded that non-media defendants were NOT entitled to that protection. In Denny v. Mertz, 106 Wis. 2d 636, 318 N.W. 2d 141 (1982) Justice Day speaking for the Wisconsin Supreme Court held:

> "We find no case directly in point on this issue and it appears to be a case of first impression before this court.
>
> The supreme court has not ruled as to whether the standards governing defamation actions set forth in Gertz apply to all defendants, or just media defendants. In Calero, 68 Wis. 2d at 501-507, this court held that the constitutional restrictions on the common law of defamation set forth in Gertz and its predecessors did not apply to a purely private communication between individuals. However in Polzin, 54 Wis. 2d at 586, this court held that critics of the media were entitled to the same level of protection against actions for defamation as was the media, despite the fact that the allegedly libelous statement at issue was contained in a letter from a private individual which was never published. However, that is not an issue in this case....
>
> It would be poor public policy to hold that a defendant defaming a private individual to non-media persons has no constitutional protection but if he disseminates his defamation to the media, then it is protected. A defamation that is published or broadcast

gets infinitely greater circulation and can do the defamed person much greater harm. That such a defamer can then wrap himself in the constitution and acquire greater protection because he has done more harm is not the law of Wisconsin.

While we recognize that some courts in other jurisdictions have held that the Gertz protections apply to all defamations, regardless of whether published through the media or by private persons, we do not read Gertz as requiring that the protections provided therein apply to non-media defendants nor, as stated above, do we consider it good public policy to so decide. We reaffirm our holding to Calero that purely private defamations are not entitled to constitutional protection for, as stated by Mr. Justice Goldberg in his concurring opinion in New York Times, 376 U.S. at 301-02, quoted with approval by this court in Calero, 68 Wis. 2d at 505:

> 'Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.'

We therefore hold that Mertz's statement to Santry is entitled to no constitutional protection and that his liability for the statement, if any, should be determined according to the common law of defamation in this state." [Footnotes omitted.] 106 Wis. 2d 636 at pp. 660 - 661.

The opinion of the Seventh Circuit in the instant case sidestepped the Wisconsin Supreme Court's Denny decision in the following fashion.

"Even so, plaintiffs, insist, they need not establish actual malice because neither Salter nor Toth is a reporter or a publisher of a newspaper. Twelve years ago the Supreme Court of Wisconsin observed that the Supreme Court of the United States 'has not ruled as to whether the standards governing defamation actions set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) applied to all defendants, or just media defendants.' Denny v. Mertz, 106 Wis. 2d 636, 660 318 N.W.2d 141, 152 (1982).

There is still doubt whether the Constitution applies the same standards to media and private defendants. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986); Hutchinson v. Proxmire, 443 U.S. 111, 133 n. 16 (1979). How the Supreme Court understands the First Amendment is, however, neither here nor there. We have been exploring how Wisconsin understands its own law...Cases since Denny have made it clear that a public figure must establish that the defendant acted with actual malice. Van Stratten, the most recent in this line,[5] collects earlier decisions. None of the cases we could find suggests that Wisconsin

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[5]Van Stratten v. Milwaukee Journal, 151 Wis. 2d 905, 447 N.W. 2d 105 (Wis. App. 1989) is a case clearly involving a media defendant which holds "Because of his status as a limited purpose public figure Van Stratten must recite some facts showing that the newspapers printed the statements with actual malice...." (emphasis supplied) 151 Wis.2d @ 917. How the holding in Van Stratten can be interpreted to support the contention that the Denny v. Mertz holding of the Wisconsin Supreme Court that non-media defendants are not entitled to "actual malice" protection has been reversed, is truly a mystery.

> imposes a lesser burden on a public figure suing a psychologist or prosecutor then on one suing a reporter.
>
> Actually we could not find cases either way on this subject; all of Wisconsin's 'public figure' cases were against media defendants." (App. 7 - 8)

The Court of Appeals for the Seventh Circuit then goes on to decide that under Wisconsin common law there exists a qualified scholar/prosecutor privilege and a plaintiff suing a prosecutor or scholar must meet the "actual malice" burden of New York Times v. Sullivan as a matter of state law. As discussed in § II infra that holding is not only contrary to Wisconsin case law precedent but violative of Erie Railway Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Having made the leap from and avoided answering the question of whether non-media defendants are entitled to the "actual malice" protection, the Court of Appeals for the Seventh Circuit goes on to analyze the evidence directed toward "actual malice" and concludes that the plaintiffs' evidence was insufficient - primarily because the defendants Toth and Salter had sworn that they had investigated the plaintiffs' works and actions and were knowledgeable enough about the persons who made the defamatory statements on the "Mr. Bubbles" tape so that all of the defamatory statements the defendants Toth and Salter believed to be true. Such a holding read the submissions in the light most favorable to the defendants rather than to the plaintiffs, as is the rule:

> "We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. Anderson v. Liberty Lobby, Inc., 477 U.S., at 255, 91 L. Ed. 2d 202, 106 S.Ct. 2505." Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 115 L. Ed. 2d 447 at 474-75 (1991).

The case at bar squarely raised the issue of whether or not non-media defendants were entitled, as a matter of constitutional First Amendment law, to the heightened protection of the "actual malice" test of New York Times v. Sullivan and its progeny. Neither the District Court nor the Court of Appeals for the Seventh Circuit responded on the issue directly.

Here it is of note that the plaintiffs Underwager and Wakefield are not "household names" in any reasonable sense of that phrase. As a matter of fact, the man on the street survey in Madison, Wisconsin taken well after the case was filed and but a few months before the trial date disclosed that the plaintiffs were virtually unknown to the public at large. What little reknown they had achieved over years of work in their field was confined to a handful of prosecutors, psychologists, and defense attorneys and then solely in the context of discrete civil and criminal trials whereat they presented expert testimony and the limited circulation of the two esoteric books they had written.

Is it reasonable to hold that such limited purpose public figures can be subjected to savage false attack upon their qualifications, integrity, and professional reputation and their attackers are immunized from civil liability by the simple expedient of signing an affidavit that the attackers believe the calumny to be true?[6] Such a holding makes a mockery of the tort of defamation.

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[6]This expedient was rejected by the Supreme Court in the Masson v. New Yorker Magazine, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)

II. THE WRIT SHOULD BE GRANTED BECAUSE THE RATIONALE OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE CASE LAW PRECEDENT OF WISCONSIN CONCERNING ITS COMMON LAW REGARDING DEFAMATION AND VIOLATES THE DOCTRINE OF ERIE RAILWAY CO. V. TOMPKINS, 304 U.S. 64, 58 S.Ct. 817 L.Ed. 1188 (1938).

"Since the later half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

In Shakespeare's Othello, Iago says to Othello:

'Good name in man and woman, dear my Lord.

Is the immediate jewel of their souls.

Who steals my purse steals trash;

Tis something, nothing;

T'was mine, tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him,

And makes me poor indeed.' Act III, Scene 3.

> Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, supra, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, e.g., Restatement of Torts § 558 (1938); Gertz v Robert Welch, Inc. 418 US, at 370, 41 L Ed 2d 789, 94 S Ct 2997 (White, J., dissenting) ('Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule'). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion." Justice Rehnquist in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 2d 1 (1990).

Contrary to the conclusion of the Seventh Circuit that under the common law of the State of Wisconsin there is a qualified scholar/prosecutor privilege which requires a public figure to "…..establish that the defendant acted with actual malice..." in order for a plaintiff to recover against a scholar/prosecutor, the case law precedent of Wisconsin has expressly held that conditional or qualified privileges in Wisconsin are subject to the common law malice tests rather than the exalted and heightened "actual malice" required under federal constitutional law. In Calero v. Del Chemical Corp., 68 Wis. 2d 487, 228 N.W. 2d 737 (1974) Justice Day speaking for the unanimous Wisconsin Supreme Court stated:

> "'Actual malice' in defamation cases refers to a

constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis. 2d 578, 587, 588, 196 N.W. 2d 685:

'At the outset it is important to note that there are two types of malice: 'Express malice' is that malice described in the jury instruction used in this case, that is 'ill will, envy, spite, revenge', etc.; the supreme court in Rosenbloom also referred to this type of malice as 'common law malice.' 'Actual malice' (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement was false or published with reckless disregard of whether it was false or not. 'Actual malice' is what is required for a constitutional determination of libel under New York Times.

'Express' and 'actual' malice are very different concepts.'

The term 'actual malice' arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.' New York Times Co. v. Sullivan (1964), 376 U.S. 254, 279, 280, 84 Sup. Ct. 710, 11 L.Ed. 2d 686, 95 A.L.R.2d 1412.

The problem of actual malice arises in the cases involving first amendment protections afforded to the media such as newspapers, television and radio, or comments made about public officers or public figures. But the defamation alleged here falls within the non-constitutional conditional privilege.

"We need not get into the question of whether the evidence adduced here would have supported a finding of actual malice under the Times test because that is not the test which applies here. The proper test to apply to determine whether the non-constitutional conditional privilege was abused is a question of express

malice. This is what is termed 'common law malice' by the United States Supreme Court. Rosenbloom, p. 37, footnote 9. It exists when the person acts from motives of ill will, envy, spite, revenge or any other bad or corrupt motives." (Emphasis supplied) 68 Wis. 2d @ pp. 499-500, 507.

The Court of Appeals for the Seventh Circuit therefore mistakenly imposed the "actual malice" standard upon the Wisconsin common law concerning conditional, qualified privileges when the appropriate test under Wisconsin common law was "express malice" or "common law malice".

Under the doctrine of Erie Railway Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) the federal courts are constrained by the common law of the several states. Aside from the First Amendment cases there is no federal common law with respect to the tort of defamation. Accordingly, it is for the state courts or legislatures to provide the perameters of the substantive common law governing defamation. Where there is an open question or question of first impression concerning state law obviously a federal court must answer the question. ("Actually, we could not find cases either way on this subject; all of Wisconsin's "public figure" cases were against media defendants.") (App. 8) However, the federal court is not allowed to go beyond the answer and impose upon the State of Wisconsin common law an "actual malice" standard which has been expressly rejected by its case law precedent. The opinion of the Seventh Circuit does just that:

"Plaintiffs therefore need to persuade us that Wisconsin would establish such a distinction for purposes of its domestic law. Yet they offer no reasons to suppose the state would do so.[7] Just as the public has a strong

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[7]The parties had not been alerted to the possibility that the case would be decided on qualified privilege state law. However plaintiffs had noted Calero v. Del Chemical Corp.,

interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements so the public has a strong interest in protecting scholars and prosecutors. We do not disparage the countervailing private interest and reputation; that is why even the New York Times privilege is qualified rather than absolute. The private interests at stake is not greater when the defendant is a psychologist rather than a reporter; the limited circulation of an unpublished monograph implies that any distinction would run the other way. And the private need for the privilege may well be greater in the case of scholars and prosecutors than in the case of newspapers and broadcasters....." (App. 8)

The Court then goes on to hold that the standard to be applied to the qualified privilege that has just been called into existence is "the actual malice" heightened protection of New York Times v. Sullivan and its progeny. There is absolutely nothing from the case law precedent of Wisconsin from which such a conclusion can be drawn. In fact, the opposite is the case. See Calero v. Del Chemical, supra and Polzin v. Helmbrecht, 54 Wis. 2d 578, 196 N.W. 2d (1972). The case law precedent of the State of Wisconsin, unequivocally and resoundingly asserts that the standard to be applied is that of common law express malice.[8] Ill will is the essence of express

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supra and Dalton v. Meister, 52 Wis. 2d 173, 188 N.W. 2d 494 (1971) which also bore on the issue, in their brief. There was no discussion or argument by any of the parties on the question of Wisconsin qualified privilege.

[8]Many other jurisdictions are in accord. For example California. "Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff..." Brewer v.

malice.

> "At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the Supreme Court in Rosenbloom also referred to this type of malice as "common law malice".... Polzin v. Helmbrecht, 54 Wis. 2d 578, 587, 588, 196 N.W. 2d 685 (1972).

The opinion of the Seventh Circuit created an obvious Erie problem as is evidenced by the jurisprudence of both the United States Supreme Court and the Seventh Circuit. See Salve Regina College v. Russell, 490 U.S. 225, 226, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("The concept of a federal common law, lurking (to use Justice Holmes' phrase) as a brooding omnipresence in the sky; was questioned for some time before being firmly rejected in Erie Railway Co. v. Tompkins ..... Erie mandates that a federal court sitting in diversity apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary."); Chambers v. Nasco, Inc., ____U.S.____, 111 S.Ct. 2133, 2148, 115 L.Ed.2d 27 (1991); Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 101 L.Ed. 2d 123 (1988); Boyle v. United Technologies Corp., 487 U.S. 500, 517, 108 S.Ct. 2510, 101 L.Ed. 2d 442 (1988) (Brennan, J. dissenting) ("Before our decision in Erie....., federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion rules of 'general' federal common law....Erie renounced the prevailing scheme...In pronouncing that "[t]here is no federal general common law,".....Erie put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law.); Mele v. Sherman Hosp., 838

Second Baptist Church, 32 Cal.2d 791, 797, 197 p. 2d 713 (1948).

F. 2d 923, 926 (7th Cir. 1988) ("The constitutional underpinnings of Erie ..... that the states, not the federal government, have the sole power to make law in those areas not specifically reserved to the federal government - counsel that the federal judiciary, when deciding cases based on diversity of citizenship, ought to refrain from intruding unnecessarily into the states' law making process....It should be allowed to develop those principles on a case-by-case basis without unnecessary comment by federal judges."); Wells v. Vincennes University, 982 F. 2d 1147, 1150-51 (7th Cir. 1992); Benning v. Bd. of Regents of Regency Universities, 928 F. 2d 775, 779 (7th Cir. 1991).

III. THE WRIT SHOULD BE GRANTED BECAUSE THE CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO ANNOUNCE THAT CONTINUED REPUBLICATION OF DEFAMATORY MATERIAL IS RELEVANT AND SUBSTANTIAL EVIDENCE OF "ACTUAL MALICE."

> "Leaving aside the special considerations when public officials are the target, New York Times v. Sullivan..., a libelous publication is not protected by the Constitution. Beauharnias v. Illinois, 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 752 (1952)" New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).
>
> "An essentially private dispute that attracts the public interest will not suffice as a public controversy." Time, Inc. v. Firestone, 424 U.S. 448, 454-455, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

In order to fully comprehend the significance of the republication by both sale of the "Mr. Bubbles" tape and repeated presentation of the "Mr. Bubbles" videotape at

conferences throughout the United States, it is necessary to recite excerpts, verbatim, made by the participants and interviewees on the "Mr. Bubbles" videotape which defamed the plaintiff, Dr. Ralph Underwager. Some of the statements were:

"**MUNRO:** A girl accuses her own father of rape. Underwager said it was just a delusion [Tape shown of Underwager giving evidence]. The jury didn't believe him.

VAUGHAN: I think Underwager must have trouble sleeping.

MUNRO: ....One of the key Deren witnesses was a hired gun from the United States, a psychologist named Ralph Underwager, who says he is an expert in child sexual abuse. He testified that the childrens' evidence had been contaminated and that they were too young to know what the truth was. But just what is Mr. Underwager's expertise and how much respect does he command in American courts? We went there to find out. And we should warn that at times in this report the language has to be quite explicit....

MUNRO: This is Ralph Underwager psychologist. He was paid Twenty-Five Thousand Dollars and gave crucial evidence in favor of Tony Deren. Evidence which helped Deren walk free....

MUNRO: Ralph Underwager was imperative to Tony Deren's defence. As a supposed independent expert he testified that the evidence of the Bubbles children had become contaminated and they were too young to understand their duty to tell the truth. But, here in America we've certainly discovered Underwager's reputation and credentials aren't all they're cracked up to be.

MUNRO: Mr. Peters, are professional witnesses like Ralph Underwager dangerous?

PETERS: They can be very dangerous....

MUNRO: Jim Peters is a senior attorney with the National Centre for the Prosecution of Child Abuse. He's investigated Underwager for the past three years....
PETERS: Underwager is presented as a scientific observer when in fact from our perspective more often than not he is there as an advocate.
MUNRO: And anything but independent.
PETERS: Anything but.
SALTER: I think he is someone who makes his living going around the country and testifying against children in child sexual abuse cases. He says the same thing in essentially every case which is.....
MUNRO: And Anna Salter knows what's she talking about. A Ph.D. from Harvard and a Master's Degree in early childhood. She says young children can be believed.
MUNRO: Six American states have given Dr. Salter a grant to check Underwager's methods in court and what did she find?
SALTER: That he is inaccurate. That what he says in court does not necessarily fairly represent the literature.
MUNRO: He distorts the facts.
SALTER: Oh....frequently. Sometimes he quotes specific studies and he's frequently wrong about what the studies say....
MUNRO: In Mr. Bubbles case he said his qualifications were never in question.
PETERS: Well if he's talking about the Swan ruling, you could say he was perseverating.
MUNRO: Lying.
PETERS: Yes.
MUNRO: Now the second incident in the Mr. Bubbles case was where Underwager said 'that ninety per cent of accusations against child molesters are wrong.' Now is that backed up scientifically?
SALTER: No that's gobblegook I don't know of any

study that would support that....

MUNRO: Over the past couple of years courts across America have begun saying 'no' to Underwager. That his expert evidence is unreliable. Two recent cases here in New York said just that. But even more damning was a case last year, the Herrick case.

PETERS: It was the court's observation that Dr. Underwager's testimony was based on inadequate research and his preparation was inadequate and therefore lacking in sound foundation.

MUNRO: Again damning.

PETERS: Yes it is.

MUNRO: Well there's no bones about it there, inadequate.

PETERS: In all of these cases that's what the courts have ruled....

MUNRO: Ralph Underwager was hired to defend Polly's father and as usual he testified that nothing had happened. It was all a delusion and Polly had simply made the whole story up. But then Underwager was cross examined by Polly's lawyer, Charles Vaughan.

VAUGHAN: He used the theory that it was a delusion of the child. That she was doing a favor for the mother by saying this happened when it really didn't happen to gain the favor and to be the apple of the eye of the mother.

MUNRO: A delusion that she was continually raped over four days.

VAUGHAN: That's right....

MUNRO: The jury took only an hour to decide that Polly Barnes was telling the truth and that Ralph Underwager's testimony, that nothing had happened, could be ignored. In fact Underwager's evidence was rejected so much the jury awarded Polly three and a quarter million dollars.

MUNRO: So while Underwager was being rejected

here in America he had no such trouble at the Mr. Bubbles hearing in Australia where he testified that the children were too young to tell the truth....

MUNRO: Do you think Underwager has got a lot to answer for over the years?

PETERS: I think so. I think a lot of children have suffered at his hands. Children who probably have been abused have been put back into situations where they're likely to have been molested again....

VAUGHAN: I think that Underwager must have trouble sleeping.

On the motions for summary judgment the plaintiffs had submitted affidavits noting with particularity the falsity of the statements made. In addition, with respect to the monograph, affidavits of five experts in the field were submitted, Drs. David C. Raskin,[9] Martha L. Rogers, William Thompson, Richard A. Gardner, Robyn Dawes, and Jack S. Annon, as well as the deposition testimony of Dr. Wendy Walker, an Australian psychologist who had also testified in the Australian case. Finally, deposition excerpts were submitted from the defendants Salter and Toth wherein they both admitted to the continuing presentation of the "Mr. Bubbles" videotape and the sale and distribution of both the videotape and the monograph.

Perhaps there could be some debate concerning the monograph as being less than a direct attack upon the reputation of the plaintiffs but there can be no question but that the assertions made by the interviewees during the videotape are classic defamation. The District Court so held:

"The Court must first determine whether these

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[9]A sample of the expert testimony ignored below: "Dr. Salter and Patricia Toth have grossly misrepresented the scientific literature in order to malign the plaintiffs". Par. 3 Affidavit of David C. Raskin, Ph.D.

statements are capable of defamatory meaning. Brown University in Providence, etc. v. Kirsch, 757 F. 2d 124, 128 (7th Cir. 1985). A communication is defamatory if it tends so to harm the reputation of another as to lower him/her in the estimation of the community or to deter third persons from associating or dealing with him/her. Restatement (Second) of Torts, Sec. 559 at 156 (1977). Whether a communication is capable of a defamatory meaning is a matter of law for the court to decide. Modern Products, Inc. v. Schwartz, 734 F. Supp. 362, 363 (E. D. Wis. 1990).

The Court finds that the statements published by defendants are capable of defamatory meaning because they might tend to so harm the reputation of the plaintiffs as to lower them in the estimation of the community and to deter third persons from associating with them.... The truth of the statements remains a genuine factual issue." (App. 22)

Justice Stevens in delivering the majority opinion for the Court in Harte-Hanke, Inc. v. Connaughton, 481 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) discusses the "actual malice" doctrine and its practical application:

"Actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' St. Amant v. Thompson, 390 US 727, 730, 20 L Ed 2d 262, 88 S Ct 1323 (1968), we have made clear that the defendant must have made the false publication with a 'high degree of awareness of...probable falsity,' Garrison v. Louisiana, 379 US 64, 74, 13 L Ed 2d 125, 85 S Ct 209 (1964), or must have 'entertained serious doubts as to the truth of his publication', St. Amant, supra, at 731, 20 L Ed 2d 262,

88 S Ct 1323.

....Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, see Herbert v. Lando, 441 US 153, 160, 60 L Ed 2d 115, 99 S Ct 1635 (1979); Tavoulareas v. Piro, 260 US App DC 39, 66, 817 F2d 762, 789 (en banc), cert denied, 484 US, 98 L Ed 2d 151, 108 S Ct 200 (1987), and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry....

...The meaning of terms such as 'actual malice' and, more particularly, 'reckless disregard' however, is not readily captured in 'one infallible definition'. St. Amant v. Thompson, 390 US, at 730, 20 L Ed 2d 262, 88 S Ct 1323. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. (Emphasis Supplied ES.) 105 L. Ed. 2d 562 @ 576, 577, 587-588.

Although "ill will" in and of itself admittedly is usually insufficient to prove actual malice it is a factor of relevance. The West Virginia Supreme Court in Hinnerman v. Dailey Gazette Company, 423 S.E. 2d 560 (W. Va. 1992) observed:

"....ill will toward the victim is admissible circumstantial evidence of actual malice." Footnoting to Harte-Hanke. And further:

"....Similarly, although partisanship, animus toward the subject of a libel, or other 'malicious' motives are not, alone, conclusive evidence of actual malice as that term is defined in New York Times v. Sullivan, supra, and subsequent cases, partisanship, ill will toward the subject of the libel, and other 'malicious' motives may be considered by the jury in their determination of whether a subjective realization of the statement was false or a subjective realization that the statement was being published recklessly, existed at the time the

statement was published." (Emphasis Supplied) 423 S. E. 2d @ pp. 572, 573.

In the case at bar the defamatory statements as set forth supra made concerning the plaintiff Ralph Underwager in the course of the "Mr. Bubbles" tape were repeatedly sold and republished after the initiation of the present action against the defendants for defamation. The Court of Appeals for the Seventh Circuit disregards the republications as merely evidence of "ill will" and observes that ".....plaintiffs' counsel have been taken in by the lay connotations of 'actual malice'." (App. 10) To the contrary, petitioners' counsel advanced the argument below that is presented here; to-wit: republication by sale and presentation under the totality of the circumstances should be considered evidence of "actual malice". There is no contrary indication from any prior decision of the United States Supreme Court.

As Justice Stevens observed in Bose Corp. v. Consumers Union:

> "In cases where the line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see.... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect'. Pennekamp v Florida, 328 US 331, 335 [90 L Ed 1295, 66 S Ct 1029]; see also One, Inc. v Olesen, 355 US 371 [2 L Ed 2d 352, 78 S Ct 364]; Sunshine Book Co. v Summerfield, 355 US 372 [2 L Ed 2d 352, 78 S Ct 365]. We must 'make an independent examination of the whole record,' Edwards v South Carolina, 372 US 229, 235 [9 L Ed 2d 697, 83 S Ct 680], so as to assure ourselves that the judgment does not constitute a forbidden intrusion of the field of free expression.' New York Times v Sullivan, supra, 376 US, at 285, 11 L Ed 2d 686, 84 S

Ct 710, 95 ALR 2d 1412 (footnote omitted)." 80 L. Ed. 2d at 522.

Finally, the factual recitation in the opinion of the Court of Appeals for the Seventh Circuit is mistaken in many significant particulars. Some of the mistakes are minor and careless in nature, such as that Dr. Underwager appeared on the "Today Show", that the producers of the "60 Minutes" program sent a tape of the episode to Salter, who sent a copy to Toth, that Salter's monograph had been written before she was interviewed for the program, and that Underwager's approach has failed to carry the medical profession.[10]

Other factual misstatements are, however, greatly misleading and of significance. For example, the assertion that "all of the other reviews we could find take Salter's side rather than plaintiffs" and "they conclude that most accusations of child sexual abuse stem from memories implanted by faulty techniques rather than from sexual contact between children and adults. The books have not been well received in the medical and scientific press" and "Underwager does not offer any contrary evidence about Toth's investigations and conclusions." On the record Dr. Underwager denied giving such testimony, there are many positive reviews of the books and the plaintiffs submitted exhaustive affidavits from professionals of repute in the field challenging the Salter monograph. The declarations of the plaintiffs set forth the falsity of each specific claim that defendant Toth vouched for and explained how the defendants

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[10]In fact, Dr. Underwager has never appeared on the "Today Show," Toth received her copy of the program from Dr. Kim Oates, Salter did not publish her monograph until after the program, and the "medical" profession, per se has little if any participation in the controversy, rather it is the province of psychologists, not physicians.

had been advised that Dr. Underwager had not lied under oath or caused children to be sent back to situations where they were sexually abused again, all before the republications of the videotape.

The assertion that Underwager testified at the Deren preliminary hearing "that children are incapable of correctly remembering or accurately describing sexual contacts" was also disputed by Dr. Underwager on the record.

And, finally, the Washington Supreme Court's holding in State v. Swan is a discrete determination made concerning one case and involves the exercise of discretion by a trial judge under Washington Statute E.R. 702. It is unfair and legally imprecise to extrapolate any general or definitive conclusion as to Dr. Underwager's qualifications[11] or whether or not the scientific community accepts his "position on child interviewing" techniques from the Supreme Court of Washington's affirmance of the exercise of discretion. It is significant to note in considering the recital of the facts by the Seventh Circuit that there is a conspicuous absence of reference to the specific derogatory statements made about the plaintiff Underwager during the "Mr. Bubbles" videotape. Other than noting one comment by the defendant Salter made on the videotape - which comment is characterized as a further exposition of her monograph - the opinion makes no reference to what actually was said. One might assume that the rest of the tape was innocuous or, at the most, also merely a criticism of the plaintiffs' books. As noted above, the actual statements made about the petitioner on the "Mr. Bubbles" tape are a savage attack upon his professional reputation. The courts of this nation should afford redress for such scurrilous libel.

The Seventh Circuit opinion demonstrates how a decision

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[11]Dr. Underwager's legal qualifications as a psychologist cannot be contested.

based on the "actual malice" doctrine in the context of a particular fact situation can result in the acceptance of defamatory statements[12] as true in order to support a grant of summary judgment to defendants.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Dated at Milwaukee, Wisconsin, this 20th day of July, 1994.

Respectfully submitted,

Robert E. Sutton
Attorney for Petitioners
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

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[12]The opinion also accepts rank hearsay as fact: ("Underwager served on the board of the False Memory Syndrome Foundation until resigning after being quoted as telling a Dutch journal that sex with children is a "responsible choice for the individual" Stephen Fried, War of Remembrance, Philadelphia 66, 71 (Jan. 1994)". (App. 6) What exception to the hearsay rules does Stephen Fried enjoy? Indeed, who is Stephen Fried? Another "limited purpose public figure", no doubt.

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-2422

RALPH UNDERWAGER and HOLLIDA WAKEFIELD,

Plaintiffs-Appellants,

v.

ANNA SALTER, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 92-C-229-S—**John C. Shabaz**, *Judge.*

ARGUED DECEMBER 10, 1993—DECIDED APRIL 25, 1994

Before EASTERBROOK and ROVNER, *Circuit Judges*, and REINHARD, *District Judge.**

EASTERBROOK, *Circuit Judge.* Psychologists Ralph Underwager and Hollida Wakefield have written two books: *Accusations of Child Sexual Abuse* (1988), and *The Real World of Child Interrogations* (1990). They conclude that most accusations of child sexual abuse stem from memories implanted by faulty clinical techniques rather than from sexual contact between children and adults. The books have not been well received in the medical and scientific

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* Hon. Philip G. Reinhard, of the Northern District of Illinois, sitting by designation.

press. A review of the first in the *Journal of the American Medical Association* concludes that the authors took a one-sided approach: "it may be that the adversarial system has so influenced this discussion [about child abuse] that objectivity no longer has value. The book contains almost 420 text pages and the authors cite over 700 references, but they do not really review this body of literature, they cross-examine it. When a given reference fails to support their viewpoint they simply misstate the conclusion. When they cannot use a quotation out of context from an article, they make unsupported statements, some of which are palpably untrue and others simply unprovable." David L. Chadwick, Book Review, in 261 JAMA 3035 (May 26, 1989).

Underwager's approach has failed to carry the medical profession, but it has endeared him to defense lawyers. He has testified for the defendant in more than 200 child abuse prosecutions and consulted in many others. When prosecutors in Australia concluded that Tony Deren had sexually assaulted children who attended his wife's nursery school, Deren's lawyers hired Underwager, who testified at a preliminary hearing that children are incapable of correctly remembering or accurately describing sexual contacts. The judge accepted this view, which Underwager depicted as the medical consensus, and Deren was not committed for trial. That decision caused a public outcry in Australia, and "60 Minutes Australia," modeled after the CBS series in the United States, decided to look into the subject. Reporter Mike Munro interviewed Underwager at his clinic in Minnesota and traveled to New York to interview other persons, including Anna Salter, a psychologist who had written a monograph about Underwager's conclusions. The program, "Witness for Mr Bubbles" (Deren allegedly assaulted the children in the nursery's whirlpool bath and came to be called "Mr Bubbles" in the Australian press), aired in Australia on August 5, 1990. The producers sent a tape of the episode to Salter, who sent a copy to Patricia Toth. Since 1987 Toth, formerly a criminal prosecutor in Washington state, has been the director of the

National Center for Prosecution of Child Abuse, a project of the American Prosecutors Research Institute.

Salter had for some years doubted that Underwager's books and testimony accurately reflected the clinical literature. After receiving a grant from the New England Association of Child Welfare Commissioners and Directors to finance an annotated bibliography of studies on child abuse interviews, Salter decided to concentrate on the papers Underwager and Wakefield had cited in their 1988 book. Over the course of 18 months Salter read the original works Underwager and Wakefield had discussed. In January 1990 she delivered to the New England Association a monograph titled: "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield." This unpublished monograph has been widely circulated; Salter sent a copy to the National Center for Prosecution of Child Abuse, which has made it available to prosecutors and other interested persons. The monograph is highly critical of the 1988 book and of Underwager's testimony. Like Dr. Chadwick's book review, the monograph states that the book misrepresents the studies, rips quotations from their context (and misleadingly redacts them), attributes to scholars positions they once held but have repudiated in light of more recent research, and ignores evidence contradicting its thesis. While Chadwick's indictment of the book advances conclusions but not the supporting evidence, Salter's is packed with details. For her interview with 60 Minutes Australia, however, Salter compressed her conclusions into popular language, telling Munro that Underwager "distorts the facts" and that his testimony in the *Mr Bubbles* case that 90% of all accusations of child molestation are wrong is "gobbledygook" unsupported by any scientific evidence. In October 1990 Toth made a two-hour presentation to prosecutors at the Midwest Conference on Child Sexual Abuse and Incest, held in Madison, Wisconsin. As part of her presentation Toth played the *Mr Bubbles* episode. She has since played the tape at 10 or more other workshops.

Underwager and Wakefield believe that they have been defamed. They filed this action under the diversity jurisdiction in the Western District of Wisconsin, using the playing of the *Mr Bubbles* tape at the Midwest Conference as the actionable event. They named 11 defendants: Salter, Toth, Munro, the National Center for Prosecution of Child Abuse, the American Prosecutors Research Institute, the National District Attorneys Association, Channel 9 Australia, 60 Minutes of Australia, Mimi Rose, Charles Vaughan, and James Peters. The district judge quickly dismissed the National Center for Prosecution of Child Abuse; as a "project" of the American Prosecutors Research Institute it is not a juridical entity and cannot be sued. Channel 9 Australia and 60 Minutes of Australia also appear to be trade names rather than legal entities, but we need not worry about them because they (and Munro) have been dropped from the litigation by consent. Rose, Vaughan, and Peters were among the persons Munro interviewed for the *Mr Bubbles* segment. The district judge dismissed them because they have no contacts with Wisconsin. None of them did anything in Wisconsin, sent anything into Wisconsin, or had any way of knowing that a segment of an Australian TV series would end up being shown at a seminar in Wisconsin. The judge granted summary judgment in favor of the American Prosecutors Research Institute and the National District Attorneys Association because they had nothing to do with the defamation of which plaintiffs complain. These rulings are correct and do not require additional comment. Similarly we step lightly past the question, discussed in detail at oral argument, whether the papers in the district court show complete diversity of citizenship. Additional documents filed after oral argument establish jurisdiction. 28 U.S.C. §1653.

Only Salter and Toth remained as defendants. The district court granted summary judgment in their favor, concluding that no evidence in the record suggests that they acted with "actual malice"—a term that reads to the untutored eye as a proxy for "ill will" but actually means knowledge that the statement was false, or doubts about

its truth coupled with reckless disregard of whether it was false. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429-30 (1991). See also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990). The district judge assumed that Salter and Toth hold Underwager in low esteem and would be delighted to see his career as an expert witness in tatters, but the judge held that the undisputed evidence shows that Salter believes that all of her statements are true, that Toth believes that the statements in the *Mr Bubbles* tape are true, and that neither person acted recklessly in reaching these conclusions. Salter and Toth add, in defense of their judgment, that the undisputed facts show that the statements are actually true, making their states of mind (and the care that preceded their statements) irrelevant. Like the district court we shall assume that at least some of the statements are untrue and defamatory. Cf. *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994). Affidavits offered in opposition to the motion for summary judgment create a material dispute on the truth of the statements. Like the district court, however, we believe that there is no bona fide dispute about actual malice.

Before discussing that issue in detail, however, we take up plaintiffs' argument that they need not establish actual malice—either because they are not public figures or because Wisconsin law reserves the actual malice standard for the press. Note that we speak of Wisconsin law, not of the complex of rules under the first amendment that has been developing since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Constitutional defenses are irrelevant unless state law creates liability. Federal courts decide constitutional questions only when necessary. So the first, and as it turns out the last, subject is whether Wisconsin would require Salter and Toth to pay damages. (The parties agree that Wisconsin law applies.) Like other states, Wisconsin recognizes many defenses to claims of

defamation. Some of these have come under the influence of constitutional doctrine in the wake of *New York Times* but remain questions of state law; others have been rooted in the common law from the outset. For example, there is a privilege for statements among persons sharing a common interest—as prosecutors share an interest in knowing about defense strategies in child molestation cases. See *Zinda v. Louisiana Pacific Corp.*, 149 Wis. 2d 913, 440 N.W.2d 548 (1989); *Restatement (2d) of Torts* §596 (1976). Salter and Toth published their statements to persons sharing a common interest, but the privilege is conditional and is lost if abused. Knowledge that the statement is false would constitute abuse, *Ranous v. Hughes*, 30 Wis. 2d 452, 468, 141 N.W.2d 251, 259 (1966), so state law requires us to examine that issue.

According to plaintiffs, this is inappropriate because they are not public figures. Although we doubt the significance of this issue to the privilege outlined in §596 of the *Restatement*, it is potentially important because we do not know the composition of the audience for the works. Have the monograph and tape circulated beyond criminal prosecutors? What the record reveals about the plaintiffs, however, establishes that they are limited-purpose public figures. They have published two books on a subject of great public interest. Underwager has testified in numerous cases and addressed more than 30 conferences on the subject of child sexual abuse. He has appeared on many television programs, including the "Phil Donahue Show," the "Today Show," and "Geraldo," and agreed to be interviewed for the *Mr Bubbles* segment—although he changed his mind after concluding that Munro was not a friendly interviewer, and the tape depicts him shooing the camera crew out of his office and calling Munro a "bastard." Underwager served on the board of the False Memory Syndrome Foundation until resigning after being quoted as telling a Dutch journal that sex with children is a "responsible choice for the individual." Stephen Fried, *War of Remembrance*, Philadelphia 66, 71 (Jan. 1994). Wakefield still is a member of that organization's board. Wisconsin treats as a limited-purpose public figure a person

whose "role in the controversy" explored by the defendant's speech "is more than trivial or tangential". *Van Straten v. Milwaukee Journal*, 151 Wis. 2d 905, 913, 447 N.W.2d 105, 109 (Wis. App. 1989). Both Underwager and Wakefield are "more than trivial or tangential" figures in the public controversy about child abuse, striding into that arena by choice. That a man-on-the-street survey in Madison, Wisconsin, reveals that almost none of the pedestrians could identify Underwager or Wakefield shows little; few people can name the Chief Justice of the United States. Underwager and Wakefield are well-known personages in the legal, medical, and scientific debates about children's ability to describe their sexual experiences; that is quite enough to lead Wisconsin to apply its public figure rules to an analysis of statements about this subject.

Even so, plaintiffs insist, they need not establish actual malice because neither Salter nor Toth is a reporter or the publisher of a newspaper. Twelve years ago the Supreme Court of Wisconsin observed that the Supreme Court of the United States "has not ruled as to whether the standards governing defamation actions set forth in *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323 (1974)] apply to all defendants, or just media defendants." *Denny v. Mertz*, 106 Wis. 2d 636, 660, 318 N.W.2d 141, 152 (1982). There is still doubt whether the Constitution applies the same standards to media and private defendants. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986); *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979). How the Supreme Court understands the first amendment is, however, neither here nor there. We have been exploring how Wisconsin understands its own law. *Denny* held that one private person's defamation of another private person should be adjudicated according to the common law, without any special burden on the plaintiff. 106 Wis. 2d at 661, 318 N.W.2d at 153. We have concluded, however, that Underwager and Wakefield are not private persons; when talk turns to child abuse, they are public figures. Cases since *Denny* have made it clear that a public figure must establish that the defendant

acted with actual malice. *Van Straten*, the most recent in this line, collects earlier decisions. None of the cases we could find suggests that Wisconsin imposes a lesser burden on a public figure suing a psychologist or prosecutor than on one suing a reporter.

Actually, we could not find cases either way on this subject; all of Wisconsin's "public figure" cases were against media defendants. Plaintiffs therefore need to persuade us that Wisconsin would establish such a distinction for purposes of its domestic law. Yet they offer no reasons to suppose the state would do so. Just as the public has a strong interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements, so the public has a strong interest in protecting scholars and prosecutors. We do not disparage the countervailing private interest in reputation; that is why even the *New York Times* privilege is qualified rather than absolute. The private interest at stake is not greater when the defendant is a psychologist rather than a reporter; the limited circulation of an unpublished monograph implies that any distinction would run the other way. And the private need for the privilege may well be greater in the case of scholars and prosecutors than in the case of newspapers and broadcasters. Newspapers, magazines, and broadcast stations reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business or even substantially temper their reports. (Consider that the British press, which lacks the *New York Times* shield, is today at least as likely as the American press to publish adverse information about public figures.) Psychologists compiling monographs with the aid of research grants, and prosecutors seeking to augment one side's arsenal for trial, do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants.

What, then, does the record show about actual malice? Did Salter or Toth know that the statements were false?

Did either one harbor doubts about the statements' truth yet plunge recklessly ahead? The record allows no doubt about the answer to either question, for either defendant.

Salter testified by deposition that she read every one of the more than 500 papers her monograph discusses, and that she believes that her interpretation of these studies (and her condemnation of the Underwager and Wakefield interpretation) is correct. Salter's view of the scholarly literature is congruent with Dr. Chadwick's, and all of the other reviews we could find take Salter's side rather than plaintiffs'. Sandra Shrimpton, Book Review (of *Accusations . . .*), 14 Child Abuse & Neglect 601-02 (1990); David L. Chadwick, Book Review (of *Real World . . .*), 15 Child Abuse & Neglect 602-03 (1991); Lenore Olson, Book Review (of *Real World . . .*), 37 Social Work 276 (1992); John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 Mich. L. Rev. 1709, 1711-17 (1990) (discussing *Accusations . . .* and two books by other authors). Some judges have reached a similar conclusion. For example, the Supreme Court of Washington held that Underwager's analysis and conclusions are not accepted by the scientific community, making it appropriate for a trial judge to preclude him from testifying. *State v. Swan*, 114 Wash. 2d 613, 655-56, 790 P.2d 610, 632 (1990). See also *Timmons v. Indiana*, 584 N.E.2d 1108 (Ind. 1992) (sustaining a decision to limit Underwager's testimony severely). Cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). It may be that Salter, the judges, and the book reviewers all err in evaluating the Underwager-Wakefield work. Scientific truth is elusive. Nothing in this record suggests, however, that Salter either knew that she was writing falsehoods or feared that she might be doing so but barged ahead without checking.

Toth filed an affidavit describing what she did before playing the *Mr Bubbles* tape. Instead of accepting at face value what reporter Munro and the persons he interviewed had said, Toth read the transcript of the *Deren* hearing, all of the cases to which any of the persons on the tape

referred, and a scientific report on the subject. She concluded that the allegations made against Underwager are true, and only then did she play the tape as part of her presentation. Underwager does not offer any contrary evidence about Toth's investigation and conclusions. (Only Underwager sued Toth; the *Mr Bubbles* tape does not mention Wakefield.)

In lieu of evidence about defendants' investigation and state of mind concerning the truth of their statements, plaintiffs offer the fact that both Salter and Toth have continued publishing the defamatory statements. Salter's monograph remains in circulation, and she continues to pass out copies of the *Mr Bubbles* tape. Toth frequently lectures on the subject of child molestation, and she continues to use the *Mr Bubbles* tape as part of her presentation. Surely this establishes their malice, plaintiffs insist. Repeated publication is the principal reason Underwager and Wakefield offer in support of their claim that Salter and Toth acted with actual malice. The only other evidence is a statement by Wendy Walker, an Australian psychologist, who testified by deposition that the "facial expression, content of speech and body language" of the persons interviewed by 60 Minutes Australia implied that these persons are "strongly negative towards Dr Underwager."

Reliance on these facts shows only that plaintiffs' counsel have been taken in by the lay connotations of "actual malice." We observed at the outset that "actual malice" has nothing in common with "ill will." A person who concludes that a public figure is a knave may shout that conclusion from the mountain tops. Both Salter and Toth came to believe that Underwager is a hired gun who makes a living by deceiving judges about the state of medical knowledge and thus assisting child molesters to evade punishment. Persons who hold such opinions cannot be expected to look kindly on their subjects, and the law certainly does not insist that they shut up as soon as they are challenged. *Van Straten*, 151 Wis. 2d at 917-18, 447 N.W.2d at 110-11 (repeated publication did not establish

actual malice when the speakers believed their statements to be true). Underwager and Wakefield cannot, simply by filing suit and crying "character assassination!", silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. Cf. *Buckley v. Fitzsimmons*, No. 89-2441 (7th Cir. Apr. 6, 1994), slip op. 8-11 & n.1. More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Plaintiffs,

v.

MEMORANDUM AND ORDER
92-C-229-S

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
MIKE MUNRO, CHANNEL 9 AUSTRALIA,
"60 MINUTES" OF AUSTRALIA,
CHARLES VAUGHAN, AND JAMES PETERS, SR.,

Defendants.

Plaintiffs Ralph Underwager and Hollida Wakefield claim that defendant Anna Salter defamed their characters. Plaintiff Ralph Underwager claims that defendant Patricia Toth defamed his character.

On April 6, 1993 the Court denied defendants' motions for summary judgment stating that factual issues remained for trial concerning the truth of the alleged defamatory statements and whether said defendants published the statements with actual malice. Both defendants have moved for reconsideration contending that no factual issue remains for trial concerning actual malice.

On April 7, 1993 defendant Salter filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, claiming that she was entitled to judgment in her favor based on the doctrine of collateral estoppel. In support of this motion she submitted a copy of a decision entered on March 23, 1993 in the United States District Court for the Southern District of California.

Under the standard established in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) and expanded in Gertz v. Robert Welch, 418 U.S. 323 (1974), the plaintiffs as "limited purpose" public figures are prohibited from recovering damages for a defamatory falsehood relating to their conduct unless they prove that defendants' statements were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not. Probative evidence of recklessness includes a publisher's knowledge of serious factual inconsistencies as well as failure to investigate or independently verify disputed or questionable factual assertions. Woods v. Evansville Press Co., Inc., 791 F. 2d 480, 489 (7th Cir. 1986).

In Chang v. Michiana Telecasting Corp., 900 F. 2d 1085, 1090 (7th Cir. 1990), the Court held that the publisher of the statement must have the forbidden state of mind, knowledge that the statement was false or reckless disregard as to its truth. It must be demonstrated that the publisher entertained serious doubts about the truth of the statements before publishing them. Van Straten v. Milwaukee Journal, 151 Wis. 2d 905, 912 (1989). Any "hatefulness" or "ill-will" by the publisher is not relevant. Id. The publisher must have made the publication with a high degree of awareness of probable falsity. Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657 (1989).

Based on the defendants' arguments for reconsideration the Court has once again examined all evidence of record including the additional submissions by plaintiffs on May 3, 1993 and plaintiffs' February 15, 1993 declaration and attached exhibit 23 to determine whether a genuine issue of fact remains concerning actual malice.

In her affidavit defendant Toth states that she believed the statements made on the videotape of the "60 Minutes" of Australia program, "Witness for Mr. Bubbles", to be true and had no reason to doubt the truthfulness of the statements when she played the videotape on October 31, 1990 at the Madison Seminar. Defendant Toth was very familiar with the subject matter discussed by Michael Munro, Jim Peters, Charles Vaughan and defendant Anna Salter on the videotape. She believed before she played the videotape that the statements made by these individuals were substantially true and accurately reflected the facts concerning plaintiff Underwager.

Defendant Toth believed the statements made by Jim Peters on the videotape were true and had no reason to doubt the truth of the statements. She had worked with Jim Peters for three years and had reviewed the materials, particularly the transcript of the Swan case, on which Peters based his statements about plaintiff Underwager.

Defendant Toth believed the statements made by Charles Vaughan on the videotape were true and had no reason to doubt the truthfulness of those statements. Prior to playing the videotape defendant Toth read the transcript of the Barnes trial and determined that Vaughan's statements were consistent with the transcript.

Defendant Toth believed defendant Salter's statements on the videotape were true and had no reason to doubt their truth. Defendant Toth read the Court's opinion in the Swan case and determined that defendant Salter accurately conveyed the Court's opinion during her interview on the videotape. Defendant Toth was also aware of defendant Salter's qualifications and had no reason to doubt her research in the field of child psychology.

Defendant Toth believed Michael Munro's statements on the videotape were true and had no reason to doubt the truth of his statements. Before she played the videotape she read the transcript

of the "Mr. Bubbles" case and summaries of plaintiff Underwager's testimony in other cases which supported Munro's statements.

In their declaration plaintiffs state that defendant Toth's tone of voice, choice of words and false statements when she introduced the videotape at the Madison seminar demonstrated malice. They assert that defendant Toth's refusal to provide them information was malicious. They also assert that defendant Toth's repeated publication of the videotape indicates her intention to attack the plaintiffs' reputations.

Exhibit 23 contains February 15, 1993 affidavits of the following experts: William C. Thompson, David R. Raskin, Martha L. Rogers, Richard A. Gardner, Robyn M. Dawes and Jack S. Annon. These experts support the plaintiffs' research and assert that statements made by defendant Tooth and Salter about said research were false.

On May 3, 1993 plaintiffs' attorney submitted an additional affidavit including relevant excerpts of Dr. Wendy Walker's deposition. This evidence indicates that two other expert witnesses besides plaintiff Underwager testified for Tony Deren ("Mr. Bubbles" at his trial.

All evidence submitted by the plaintiffs viewed in the light most favorable to them fails to dispute the affidavit of defendant Toth. Plaintiffs' evidence raises a factual issue concerning the truth of the statements made on the videotape. However, whether or not the statements are true or false is not material to the issue of actual malice.

Plaintiffs have failed to raise any genuine issue of material fact concerning defendant Toth's belief that the statements on the videotape were true or that she had reason to doubt the truth of the statements. Her investigation and familiarity with the material supports her belief that the statements were true.

There is no dispute concerning said defendant's knowledge

that the statements were true or that they were made with a reckless disregard as to their truth. Defendant Toth is entitled to judgment in her favor as a matter of law because she did not publish the videotape at the Madison seminar with actual malice.

Defendant Salter states in her affidavit that she believed her statements made during the videotaped interview were true and entertained no doubts as to their truthfulness. She further asserts that her conclusions were made after extensive research and investigation of plaintiff Underwager's work, research, court testimony and the relevant professional literature.

Defendant Salter asserts that the statements she made in her monograph were true and she had no doubts as to their truth. She spent over eighteen months reviewing over 500 articles cited by plaintiffs in their book before drawing any conclusions.

In their declaration plaintiffs assert that defendant Salter's failure to respond to their request for information demonstrated malice. They also assert that they cited 900 articles in their book rather than 500. Further, they assert that defendant Salter was totally unaware of any details concerning the production of the videotape. They assert that defendant Salter furnishes the videotape to all who request it for the price of $12.00 which reflects her intention to attack plaintiffs' reputations. They also claim that the affidavits of their experts indicate that defendant Salter's statements concerning their research were false.

This evidence viewed in the light most favorable to plaintiffs does not contradict defendant Salter's affidavit, nor does her deposition testimony taken by plaintiffs on April 9, 1993 which the Court believed necessary to examine. None of the evidence submitted indicates that defendant Salter believed her statements made in the monograph and on the videotape were false or that she had any serious doubts about the truth of her statements. Her extensive research demonstrates that she did not recklessly disregard the truth of the statements which she made.

Defendant Salter had no knowledge that the statements she made on the videotape or in the monograph were false nor did she make them with reckless disregard of the truth. She is entitled to judgment in her favor as a matter of law because she did not publish any statements with actual malice.

Because said defendants did not publish statements with actual malice they are entitled to judgment in their favor on plaintiffs' defamation claims. Their motions for reconsideration will be granted and judgment will be entered in their favor. Defendant Salter's motion for summary judgment on the basis of collateral estoppel will be denied as moot.

ORDER

IT IS ORDERED that defendants' motions for reconsideration are GRANTED.

IT IS FURTHER ORDERED that the motions of defendants Salter and Toth for summary judgment are GRANTED.

IT IS FURTHER ORDERED that defendant Salter's motion for summary judgment on the basis of collateral estoppel is DENIED as moot.

IT IS FURTHER ORDERED that judgment is entered in favor of all defendants against the plaintiffs DISMISSING their complaint and all claims contained therein with prejudice and costs.

Entered this 4th day of June, 1993.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Plaintiffs,

v.

MEMORANDUM AND ORDER
92-C-229-S

ANNA SALTER and
PATRICIA TOTH,

Defendants.

Plaintiff Ralph Underwager claims that defendant Patricia Toth defamed his character. Plaintiffs Ralph Underwager and Hollida Wakefield claim that defendant Anna Salter defamed their characters.

On February 1, 1992 defendant Toth filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact and conclusions of law, affidavits and a brief in support thereof. On February 2, 1993 defendant Salter moved for summary judgment. These motions have been fully briefed and are ready for decision.

Plaintiffs contend that defendants' motions for summary judgment should be denied pursuant to Rule 56(f) because they have not been afforded an opportunity to depose Michael Munro, Anthony McClellan or defendant Salter. Plaintiffs have not shown that their inability to take said depositions has deprived them of facts essential to their opposition of defendants' motions.

Accordingly, their Rule 56(f) motion will be denied. See Chubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 144-45 (S.D.N.Y. 1991).

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiffs Ralph Underwager and Hollida Wakefield are licensed psychologists and residents of Minnesota. Defendant Dr. Anna Salter is a certified psychologist who treats both child and adult victims of sexual and sexual abuse offenders. Defendant Patricia Toth is a former prosecutor and is currently the director of the National Center for Prosecution of Child Abuse.

Plaintiff Dr. Underwager has been retained as an expert

psychological consultant in numerous cases involving child sexual abuse. Plaintiffs co-authored the books Accusations of Child Sexual Abuse and The Real World of Child Interrogations. Plaintiff Underwager has testified in over 220 cases throughout the United States and in Australia, Canada, England, Holland and New Zealand on behalf of defendants accused of sexual abuse in both criminal and civil cases.

Plaintiffs have consulted in approximately 200 additional cases concerning child sexual abuse. They have given 30 presentations regarding child sexual abuse in the United States, England, Australia and New Zealand. Plaintiffs have been interviewed on at least 15 radio and/or television shows concerning child sexual abuse in the United States, Australia, London, Canada and New Zealand. They are prominent proponents of the "leading and suggestive questioning" defense in child sexual abuse cases and "the role of adult social influence in the development of allegations of child sexual abuse."

In the spring of 1988 defendant Salter proposed to the New England Association of Child Welfare Commissioners and Directors to develop a bibliography on child sexual abuse, interviewing skills and rebuttal materials to support the testimony of children in child sexual abuse cases. Defendant Salter's report, entitled "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield" was submitted to the New England Association of Child Welfare Commissioners and Directors in January 1990.

In the spring of 1990 defendant Salter was approached by Mike Munro to be interviewed for the "60 Minutes" of Australia program regarding a child sexual abuse case known as the "Mr. Bubbles" case. It was defendant Salter's understanding that the "60 Minutes" program would be aired only in Australia. She did not replay a videotape of that program or suggest that a videotape of that program be played at the Midwest Conference on Child Sexual Abuse and Incest in Madison, Wisconsin (Madison Seminar).

On October 31, 1990 defendant Toth taught a workshop at the Madison Seminar entitled Facts, Fallacies and Hidden Agendas: Current Issues in Child Abuse Intervention. Her workshop was directed at professionals involved in child abuse intervention and prosecution including social workers, case workers, prosecutors, physicians, psychologists and law enforcement personnel. She discussed recently decided child abuse cases, literature about child abuse and child pornography and popular experts in the field including plaintiff Underwager.

Defendant Toth showed numerous slides of newspaper articles, advertisements and photographs from periodicals. She also played a portion of the videotape of the "60 Minutes" of Australia program, "Witness for Mr. Bubbles", which was produced by Anthony McClellan. It was originally broadcast in Australia on August 5, 1990 and includes interviews with plaintiff Underwager, attorney Charles Vaughan, Assistant United States Attorney James Peters and defendant Salter. Charles Vaughan is an attorney licensed to practice law in the state of Indiana who represented Polly Anna Barnes in an action against her father claiming she was assaulted and raped by her father in their family beach house in Florida.

It is disputed whether the alleged defamatory statements published by defendants Salter and Toth are true. It is further disputed whether or not their publications of the statements were done with actual malice.

CONCLUSIONS OF LAW

Plaintiff Ralph Underwager claims that defendant Toth defamed his character when she played a videotape on October 31, 1990 of "Witness for Mr. Bubbles" which contained defamatory statements by Michael Munro, Charles Vaughan, Attorney Peters and defendant Salter. Plaintiffs contend that defendant Salter defamed their character when she made defamatory statements in her monograph and during her interview for the "Witness for Mr. Bubbles" program.

The alleged defamatory statements of defendant Salter are contained in paragraphs 14 and 19 of the plaintiffs' amended complaint. The alleged defamatory statements published by defendant Toth are contained in paragraphs 16-19 of the plaintiffs' amended complaint.

The Court must first determine whether these statements are capable of defamatory meaning. Brown University in Providence, etc. v. Kirsch, 757 F. 2d 124, 128 (7th Cir. 1985). A communication is defamatory if it tends so to harm the reputation of another as to lower him/her in the estimation of the community or to deter third persons from associating or dealing with him/her. Restatement (Second) of Torts, Sec. 559 at 156 (1977). Whether a communication is capable of a defamatory meaning is a matter of law for the court to decide. Modern Products, Inc. v. Schwartz, 734 F. Supp. 362, 363 (E.D. Wis. 1990).

The Court finds that the statements published by defendants are capable of defamatory meaning because they might tend to so harm the reputation of the plaintiffs as to lower them in the estimation of the community and to deter third persons from associating with them. Under Wisconsin law if the statements are substantially true plaintiffs cannot prevail on their defamation claim. Schaefer v. State Bar of Wisconsin, 77 Wis. 2d 120, 252 N.W. 2d 343 (1977). The truth of the statements remains a genuine factual issue.

Defendants move for summary judgment on plaintiffs' defamation claims contending that the plaintiffs are limited purposed public figures and that they are not liable unless their actions were taken with actual malice. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964) the Supreme Court held that a public figure may only recover for a defamation by proving actual malice. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Supreme Court held that in order to prevail on a defamation claim the public official had the burden of proving that a defamation by a non-media individual was made with actual malice. The Supreme Court expanded this standard to include persons who were "limited

purpose" public figures in Gertz v. Robert Welch, 418 U.S. 323 (1974). Denny v. Mertz, 106 Wis. 2d 636, 645, 318 N.W. 2d 141 (1982).

In Van Straten v. Milwaukee Journal, 151 Wis. 2d 905, 913-914 (Ct. App. 1989), the Court provided three steps for determining whether the plaintiff is a limited purpose public figure as follows: "(1) isolating the controversy at issue; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential and (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy."

Based on the undisputed facts, the isolated controversy is the credibility of testimony by children in child sexual abuse cases. The plaintiffs have written two books on this topic and testified in 220 child sexual abuse cases. They have been consulted in 200 additional cases concerning child sexual abuse, have given 30 presentations and been interviewed on at least 15 radio and/or television shows. Plaintiff Underwager was interviewed for the 60 Minutes Australia program, "Witness for Mr. Bubbles." The Court concludes that the plaintiffs' role in the controversy concerning testimony by children in child sexual abuse cases is more than trivial or tangential.

The alleged defamation as presented in plaintiffs' amended complaint by defendants Salter and Toth is germane to the plaintiffs' participation in the controversy. Accordingly, the Court finds that plaintiffs are limited purpose public figures. Since plaintiffs are limited purpose public figures plaintiffs must prove that they published the statements with actual malice. A genuine issue of fact remains concerning whether or not the defendants acted with malice which will be resolved at trial.

Defendants claim they have a qualified privilege because they made the publications in good faith on subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest. See Restatement (Second) of Torts §596. When this privilege exists plaintiffs must prove actual

malice before prevailing. It is not necessary for the Court to determine whether this privilege exists because it has found that the plaintiffs are limited purpose public figures and must therefore prove actual malice before prevailing.

Defendant Salter argues that plaintiffs' defamation claims should be dismissed because they are barred by a two year statute of limitations provided in Sec. 893.57, Wis. Stats. She contends that plaintiffs' cause of action accrued more than two years prior to the date of the commencement of this lawsuit. The alleged defamatory statements made by defendant Toth were republished within two years of the commencement of this suit. Accordingly, plaintiffs' claims are not barred by the statute of limitations. Hanson v. A. H. Robbins, 113 Wis. 2d 550 (1983).

Factual issues remain for trial concerning the truth of the alleged defamatory statements and whether or not the defendants published the statements with actual malice. Accordingly, the defendants' motions for summary judgments will be denied.

ORDER

IT IS ORDERED that the motions by defendants Salter and Toth for summary judgment are DENIED.

Entered this 6th day of April, 1993.

BY THE COURT:

JOHN C. SHABAZ
District Judge

(2) 94-314

NO. 93-314

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RALPH UNDERWAGER and HOLLIDA WAKEFIELD,
Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CHARLES VAUGHAN and JAMES PETERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL L. ZALESKI
Counsel of Record
ANDRA J. PALMER
QUARLES & BRADY
1 South Pinckney Street
Madison, WI 53703
(608) 251-5000

Attorneys for Respondents
Patricia Toth, Mimi Rose, James Peters, National Center for Prosecution of Child Abuse, American Prosecutors Research Institute and National District Attorneys Association

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QUESTIONS PRESENTED

1. In a defamation case based on diversity jurisdiction, does the court of appeals' decision pursuant to state law raise an issue appropriate for this Court's discretionary review?

2. As a matter of Wisconsin law, does a public figure plaintiff have the burden of proof of "actual malice" in a defamation case?

3. Do multiple publications of an allegedly defamatory videotape of a nationally broadcast *60 Minutes* news show constitute "actual malice" under Wisconsin law?

PARTIES

Petitioners, Ralph Underwager and Hollida Wakefield are individual citizens of Minnesota.

Respondent Patricia Toth is an individual citizen of Virginia.

The below respondents are not parties to this appeal, but were parties to the proceeding in the U.S. Court of Appeals for the Seventh Circuit:

(1) Respondent National Center for Prosecution of Child Abuse (the "Center") is a project of American Prosecutors Research Institute (APRI), which is an affiliate of the National District Attorneys Association ("NDAA"). APRI and NDAA are non-profit, nonstock corporations incorporated under the laws of the State of Virginia. The Center, APRI and NDAA all have their headquarters and principal places of business at 99 Canal Center Plaza, Suite 510, Alexandria, Virginia 22314.

(2) Respondent Mimi Rose is an individual citizen of Pennsylvania.

(3) Respondent James Peters is an individual citizen of the U.S. Virgin Islands.

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TO THE HONORABLE SUPREME COURT:

The Respondents, PATRICIA TOTH, THE CENTER, APRI, NDAA, MIMI ROSE and JAMES PETERS, respectfully request the Court to deny the Petition for Writ of Certiorari submitted by the Petitioners, RALPH UNDERWAGER and HOLLIDA WAKEFIELD.

OPINIONS BELOW

In a published opinion, the Seventh Circuit Court of Appeals affirmed the Federal District Court for the Western District of Wisconsin decisions (1) dismissing the Center, Rose, and Peters; (2) granting summary judgment in favor of APRI and NDAA; and (3) granting Patricia Toth's motions for reconsideration and summary judgment. The Seventh Circuit's decision is published as *Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1994) and reproduced in the Petitioners' Appendix to Underwager's Petition for Writ of Certiorari ("App."). Two of the district court's opinions also are reproduced in the Appendix.

JURISDICTION

Petitioners seek certiorari pursuant to 28 U.S.C. § 1254(1) of a decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decisions on April 25, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is involved in this diversity action.

STATEMENT OF THE CASE

Patricia Toth is a former prosecutor who is employed by APRI as the Director of the Center. In this capacity, she gives seminars on child abuse intervention and prosecution across the United States. On October 31, 1990, she held a workshop in Madison, Wisconsin entitled *"Facts, Fallacies and Hidden Agendas: Current Issues in Child Abuse Intervention"* at the Midwest Conference on Incest and Child Sexual Abuse ("Madison Seminar"). Her workshop was directed at professionals involved in child abuse intervention and prosecution, namely social workers, case workers, prosecutors, physicians, psychologists and law enforcement personnel.

During her two hour workshop, she discussed (1) recently-decided child sexual abuse cases, (2) literature about child abuse and child pornography, and (3) popular experts in the field, including Ralph Underwager. She showed numerous slides of newspaper articles, advertisements, and photographs from periodicals. She also played a videotape of the second half of a *60 Minutes Australia* episode entitled "Witness for Mr. Bubbles," broadcast nationally in Australia on August 5, 1990 (*60 Minutes* episode).

Toth does not appear on or say anything on the *60 Minutes* episode. Rather, the basis of plaintiffs' claim is that Toth defamed Underwager by replaying the nationally broadcast television news show. Nor have plaintiffs sued Toth for saying anything at the Seminar.

It is undisputed by the parties that Toth played only the latter half of the *60 Minutes* episode at her Seminar. Toth believes it highlights four areas germane to child abuse intervention and prosecution: (1) the significance of expert witnesses in child abuse cases; (2) the theory used by the defense in the *Barnes v. Barnes* case in Indiana; (3) competing

and controversial theories advanced in child abuse psychology; and (4) a brief look at a popular expert in child abuse — Ralph Underwager. Toth felt that the twenty-minute portion of the *60 Minutes* episode afforded a unique opportunity for professionals with an interest in child abuse to see how child abuse cases are handled.

The *60 Minutes* episode focuses on the infamous and widely publicized Australian criminal proceeding known as the "Mr. Bubbles" case. An Australian defendant, Tony Deren, was accused of sexually abusing in a hot tub, children who attended his wife's nursery school. Thus, he was dubbed "Mr. Bubbles" in the Australian press. Deren retained Ralph Underwager as his expert witness. Based in large part on Underwager's view that the children who identified Deren as having molested them were too young to give competent testimony, Deren was not committed for trial. This result was extremely controversial in Australia. The general public perceived it as unjust, believing Deren to have escaped justice on a legal technicality.

60 Minutes Australia produced two stories on the "Mr. Bubbles" controversy, the second of which is the subject of this lawsuit. During the summer of 1990, *60 Minutes Australia* reporter, Michael Munro conducted several interviews in the United States in connection with the "Witness for Mr. Bubbles" episode. Mr. Munro interviewed Ralph Underwager, Indiana Attorney Charles Vaughan, Assistant United States Attorney James Peters and Psychologist Dr. Anna Salter. These interviews comprise the twenty minutes of videotape that Toth played. Munro did not interview defendant Patricia Toth.

It is undisputed that Underwager essentially makes his living as a psychologist for use in legal proceedings; that he is paid to consult, and sometimes testify in civil and criminal matters. It is undisputed that Underwager has testified in more

than 200 cases as an expert witness for alleged child molesters throughout the United States, Australia, Canada, England, Holland and New Zealand. In addition, he has made dozens of oral presentations on child sexual abuse, and has made several radio and television appearances regarding child sexual abuse, including appearances on "Phil Donahue" (1985), "Geraldo Rivera" (1991), "Inside Edition" (1992), "The Today Show" (1992), and "Sightings" (1992), to name a few.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied because it does not raise an issue appropriate for the Court's exercise of discretionary jurisdiction. Both lower court decisions are squarely in line with the leading cases on defamation.

The Seventh Circuit correctly ruled that Wisconsin law holds that a public figure plaintiff must show actual malice in a defamation case.

The Seventh Circuit also correctly ruled that Wisconsin law holds that multiple publications of a nationally broadcast *60 Minutes* episode do not constitute "actual malice" in a defamation case.

I. THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THE COURT'S EXERCISE OF DISCRETIONARY JURISDICTION.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10.1. There must be "special and important reasons" to grant review. *Id.* Among the reasons that the Court considers in exercising its discretion are:

> (a) When a United States court of appeals has rendered a decision *in*

> *conflict with the decision of another United States court of appeals* on the same matter; or has decided a *federal question* in a way in conflict with a state court of last resort; or has so far *departed from the accepted and usual course of judicial proceedings*, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (b) When a state court or a United States court of appeals has decided an *important question of federal law* which has not been, but should be, settled by this Court, or has decided a *federal question in a way that conflicts with applicable decisions of this Court.*

Id. (emphasis added).

Not one of the above reasons is present here. There is neither a conflict with another U.S. court of appeals nor a federal question presented in Underwager's petition. Rather, Underwager contends that both the district court and court of appeals decisions conflict with *Wisconsin state court precedent.* No such conflict exists. Both decisions are squarely in line with the leading Wisconsin cases on defamation. *See Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1981) *cert. denied*, 459 U.S. 883 (1982); and *Van Straten v. Milwaukee Journal*, 151 Wis. 2d 905, 447 N.W.2d 105 (Ct. App. 1989) *cert. denied*, 496 U.S. 929 (1990).

II. THE SEVENTH CIRCUIT CORRECTLY DECIDED THE STANDARD OF PROOF.

A. *The Seventh Circuit Confined Its Holding to Wisconsin Law.*

The Seventh Circuit properly reviewed the district court's decision granting summary judgment to Toth by evaluating the record *de novo* to determine whether Toth was entitled to judgment as a matter of law. *Woods v. Evansville Press Co.*, 791 F.2d 480, 486 (7th Cir. 1986); *Forum Corp. of North America v. Forum, Ltd.*, 903 F.2d 434, 438 (7th Cir. 1990). The Seventh Circuit applied only Wisconsin law to Underwager's claim. *Underwager v. Salter*, 22 F.3d 730, 734 (7th Cir. 1994). There is no reason for this Court to review the Seventh Circuit's application of Wisconsin law to a garden variety defamation case. *Bishop v. Wood*, 426 U.S. 341, 346 (1976), *overruled on other grounds, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.").

B. *The Seventh Circuit Correctly Ruled that Wisconsin Law Provides that a Public Figure Plaintiff Must Show Actual Malice.*

Just as he did below, Underwager attempts to convert this routine application of state defamation law into a federal case by turning the law on its head. Underwager contends that Toth's status as a media or non-media defendant determines the burden of proof. This is not the law of Wisconsin. In Wisconsin, the focus is on the *plaintiff's status*. A public figure plaintiff must show "actual malice".

For example, in *Calero*, the Supreme Court of Wisconsin discussed the difference between a "conditional privilege" to defamation under state law and the "constitutional conditional privilege" under *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Calero* at 499-501. The plaintiff was a *private figure* in *Calero*, so the "actual malice" standard did not apply. *Id.* at 504. The court specifically noted, however, that the "actual malice" standard would apply in cases involving "constitutional conditional privileges" such as "comments made about public officers or public figures". *Id.* at 500. (Underwager admits that he is at least a "limited purpose public figure") (*Pet. at 12*). Therefore, the actual malice standard applies to him under *Calero*.

In Denny, the issue was whether the plaintiff was a public figure for purposes of determining whether the "actual malice" standard applied. *Denny*, 106 Wis. 2d at 643. The court applied a two-part test, and concluded that the plaintiff was a *private figure*. Therefore, the "actual malice" standard did not apply.

Van Straten also confirms that a public figure must show "actual malice". "Because of his status as a limited purpose public figure, Van Straten must recite some facts showing that the newspapers printed the statements with actual malice." *Van Straten*, 151 Wis. 2d at 917.

The Seventh Circuit correctly observed that there are no Wisconsin cases involving a public figure plaintiff and a *non-media* defendant (like Toth). *Underwager*, 22 F.3d at 734. This does not mean, however, that Toth's status suddenly determines the burden of proof. For purposes of determining the *plaintiff's* burden of proof in a defamation case, Wisconsin courts have always concentrated on the *plaintiff's* status; not the defendant's.

There is nothing in Wisconsin law that indicates that a lesser burden than "actual malice" should be applied to a public figure who sues a non-media defendant (as opposed to a media defendant), and Underwager offered no arguments in either the district court or the Seventh Circuit as to why Wisconsin should or would. *Id.* at 734-35. Therefore, in the absence of controlling Wisconsin law, the Seventh Circuit correctly decided that the "actual malice" standard was the appropriate burden of proof for a public purpose plaintiff in Wisconsin. *Id.; Propper v. Clark,* 337 U.S. 472, 490 (1949); *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938). Petitioners do not appeal the Seventh Circuit's decision-making power in this respect. "Where there is an open question or question of first impression concerning state law obviously a federal court must answer the question." *(Pet. at 15).*

III. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT MULTIPLE PUBLICATIONS DO NOT CONSTITUTE "ACTUAL MALICE".

Under Wisconsin law, multiple publications of an allegedly defamatory statement do not constitute "actual malice". *Van Straten,* 151 Wis. 2d at 917-18 (repeated publication did not establish actual malice when speakers believed their statements to be true). The Seventh Circuit cited this exact precedent in denying Underwager's contention that they did. *Underwager,* 22 F.3d at 736.

The uncontroverted evidence in this case reveals that Patricia Toth (1) believed the statements on the "Mr. Bubbles" episode to be true; (2) was familiar with both the speakers and materials referred to on the program; and (3) read those materials before she played the videotape for the first time at the Madison Seminar. (Declaration of Patricia Toth,

January 28, 1993) (Respondents' Appendix)[1]. Moreover, she replayed a *60 Minutes Australia* television news program that already had been nationally broadcast in Australia. The fact that Toth continued to use the videotape at subsequent seminars proves her belief in its *truth*, not the opposite, as Underwager contends.

CONCLUSION AND REQUEST FOR DENIAL

This case presents no question beyond application of Wisconsin law to the specific facts of a state run-of-the-mill defamation claim. These respondents respectfully request the Court to deny Underwager's Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and the lower courts' holdings were correct.

Respectfully submitted,

MICHAEL L. ZALESKI
(Counsel of Record)
ANDRA J. PALMER
QUARLES & BRADY
1 South Pinckney Street
Madison, Wisconsin 53703

Attorneys for Respondents Patricia Toth, the Center, APRI, NDAA, Mimi Rose and James Peters.

September 13, 1994

[1]Exhibits A and B to the Toth Declaration are not included in Respondents' Appendix due to printing requirements. They are part of the original record, however, and can be located at Docket Number 113.

RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFILED,

Plaintiffs,

v. Case No. 92-C-229-S

ANNA SALTER and
PATRICIA TOTH,

Defendants.

DECLARATION OF PATRICIA TOTH

Patricia Toth hereby declares as follows:

1. I am currently employed by the American Prosecutors Research Institute ("APRI") as Director of the National Center for Prosecution of Child Abuse, a position I have held since October, 1987. I make this affidavit upon personal knowledge and in support of Toth's Motion to Dismiss Or, In the Alternative, Motion for Summary Judgment.

2. I played the videotape of the 60 Minutes episode during my workshop entitled "Facts, Fallacies and Hidden

Agendas: Current Issues in Child Abuse Intervention," at the Midwest Conference on Incest & Child Sexual Abuse ("Madison Seminar") held in Madison, Wisconsin in late October, 1990. I started the videotape at the point in the 60 Minutes episode where the program comes back from a commercial break and the video displays the countdown of the numbers 5 through 1.

3. I am a former prosecutor, and I targeted my workshop at the Madison Seminar to professionals involved in child abuse intervention programs and practices. My program was specifically directed toward social workers, case workers, prosecutors, physicians, psychologists and law enforcement personnel.

4. During my workshop, I discussed recently decided child abuse cases, publications and literature about child abuse and child pornography, and experts in the field, including Ralph Underwager. I showed numerous slides of newspaper articles, advertisements and photographs in periodicals. I also played the latter-half of the 60 Minutes episode entitled "Witness for Mr. Bubbles."

5. I played the 60 Minutes videotape because it highlighted four different areas in child abuse intervention and prosecution: (l) the significance of expert witnesses in child abuse cases; (2) the theory used by the defense in the *Barnes v. Barnes* case in Indiana; (3) competing and controversial theories advanced in child abuse psychology; and (4) a brief look at a popular expert in child abuse, Ralph Underwager, and his verbal skills, presence and theories.

6. I feel that the 60 Minutes videotape afforded a unique opportunity for professionals with an interest in child abuse to see how cases are handled. My workshop was about 2 hours long, and the 60 Minutes videotape comprised about 20 minutes of it. It was included among the other audio and

visual presentation of several topics related to child abuse intervention. A true and correct copy of a cassette tape recording of my workshop at the Madison Seminar is attached hereto as Exhibit A.

7. I did not have any knowledge that the statements made by Munro, Peters, Vaughan or Salter in the 60 Minutes episode were false. Rather, I believed their statements to be substantially true, and made this determination before I played the videotape for the first time, which was during my workshop at the Madison Seminar.

8. I worked with Jim Peters at APRI for about 3 years. I had no reason to doubt the truthfulness of Peters' statements, and, in fact, I believed them to be substantially true. I even agreed with the opinions Peters expressed during his interview, and made my determination regarding the truth of Jim Peters' statements before I played the videotape for the first time at the Madison Seminar. Since Peters and I worked at the same office, we had access to many of the same resources and materials about Ralph Underwager. Having reviewed, for example, the *Swan* case, I believe that Peters' comments did not depart from the essence of that case, or the other cases he discussed during his interview.

9. I had no reason to doubt the truthfulness of Charles Vaughan's statements during his interview. In fact, I believed his statements to be substantially true. I believed his statements about Underwager's testimony, and the effect of Underwager's testimony on cross-examination in the *Polly Barnes* trial to be substantially true. National Center for Prosecution of Child Abuse has the transcript of Charles Vaughan's cross-examination of Underwager in the *Barnes* trial, and I have looked at it. Vaughan's statements in his 60 Minutes interview do not depart from the essence of Underwager's trial testimony, or the jury verdict, in the *Barnes* trial. I investigated this fact before I played the videotape of

the 60 Minutes episode at the Madison seminar. Any opinions which Vaughan expressed during his interview — that Underwager must have trouble sleeping at night — are not really capable of objective verification. I simply viewed them as Vaughan's opinions. I do not disagree with Vaughan anyway.

10. I had no reason to doubt the truthfulness of Dr. Salter's statements during her interview on the 60 Minutes episode. In fact, I believed her statements to be substantially true. I have read the Court's opinion in the *Swan* case regarding Underwager's qualifications as an expert, and I believe that Dr. Salter accurately conveyed the Court's opinion in *Swan* during her interview. Furthermore, I respect Dr. Salter's qualifications, and have no reason to doubt her opinions and research in the field of child psychology. For example, I have looked at the "Baurmann" report, and I agree with Dr. Salter that Underwager did not precisely summarize its conclusions. A true and correct copy of the Baurmann report is attached hereto as Exhibit B. Highlighted language on p. 527 reveals the conclusion at issue. Of course, to the extent Dr. Salter espoused professional opinions during her interview, those opinions are not capable of objective verification. I viewed them as her opinions, but I did not consider them to be false. I made my determination as to the truthfulness of her statements before I played the videotape at the Madison Seminar.

11. I had no reason to doubt Michael Munro's statements throughout the 60 Minutes episode. In fact, I believed his statements to be substantially true. Of course, where he expressed opinions and exchanged insults with Underwager, I did not really consider those to be facts capable of objective verification. Although I did not consider his opinions to be false. I had looked at a transcript of Underwager's testimony during the pretrial hearings of the Mr. Bubbles case in Australia, and summaries of

Underwager's testimony in other cases, before I played the videotape at the Madison Seminar. I believed that Munro's comments did not substantially depart from the Mr. Bubbles pretrial transcript or the other cases to which he refers during his interviews. I considered the remainder of the facts he presented to be accurate through my own working knowledge of Underwager.

12. In short, I was very familiar with the subject matter that Munro, Peters, Vaughan and Salter discussed during the 60 Minutes episode, and I believed that each person's statements were substantially true, and accurately reflected the facts regarding Underwager as I knew them to be before I played the videotape for the first time at the Madison Seminar.

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated this 28th day of January, 1993, at San Diego, CA.

/s/ Patricia Toth

Patricia Toth

Supreme Court, U.S.
FILED
SEP 23 1994
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No. 93-314

In The

Supreme Court of the United States

October Term, 1994

RALPH UNDERWAGER and HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CHARLES VAUGHAN, and JAMES PETERS, SR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN M. MOORE
JOHN W. MARKSON
Counsel of Record
TERESA A. MUELLER
BELL, METZNER, GIERHART & MOORE, S.C.
44 East Mifflin Street
Suite 1000
Madison, WI 53703
(608) 257-3764

Attorneys for Respondent Dr. Anna Salter

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. In a defamation case based on diversity jurisdiction, does the court of appeals' decision pursuant to state law raise an issue appropriate for this Court's discretionary review?

2. As a matter of Wisconsin law, does a public figure plaintiff in a defamation case have the burden of proof of "actual malice?"

3. Does republication of allegedly defamatory matter constitute "actual malice" under Wisconsin law?

THE PARTIES

Petitioners Ralph Underwager and Hollida Wakefield are licensed psychologists and citizens of Minnesota. They have co-authored the books *Accusations of Child Sexual Abuse* and *The Real World of Child Interrogations.*

Respondent Dr. Anna Salter is a citizen of New Hampshire. She is a certified psychologist who treats both child and adult victims of sexual abuse and sexual abuse offenders.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Anna Salter, respectfully requests the Court deny the Petition for Writ of Certiorari submitted by Petitioners, Ralph Underwager and Hollida Wakefield.

JURISDICTION

Petitioners seek certiorari pursuant to 28 U.S.C. § 1254(1) of a decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decisions on April 25, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is involved in this diversity action.

STATEMENT OF THE CASE

It is undisputed that Ralph Underwager has testified in over 220 cases throughout the United States and in Australia, Canada, England, Holland, and New Zealand on behalf of defendants accused of child sexual abuse in both criminal and civil cases. Petitioners have consulted in approximately 200 additional cases concerning child sexual abuse. They have given 30 presentations regarding child sexual abuse in the United States, England, Australia, and New Zealand, and have been interviewed on at

least 15 radio and/or television shows in the United States, Australia, London, Canada, and New Zealand concerning child sexual abuse. Petitioners are prominent proponents of the "leading and suggestive questioning" defense in child sexual abuse cases.

THE MONOGRAPH

Due to her concerns about the increasing use of the "leading and suggestive questioning" defense and discrediting of children's testimony in child sexual abuse cases, Dr. Salter proposed to the New England Association of Child Welfare Commissioners and Directors (New England Association) to develop a bibliography on child sexual abuse interviewing skills, and rebuttal materials to support the testimony of children in child sexual abuse cases. The New England Association is composed of the directors of social service agencies for the states of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island.

Dr. Salter decided to focus her monograph on the petitioners' book, *Accusations of Child Sexual Abuse*, because it included an extensive bibliography useful to proponents of the "leading and suggestive questioning" defense in child abuse cases, and because petitioners were prominent proponents of that defense.

In May, 1988, the New England Association agreed to fund the study and Dr. Salter began compiling and reviewing over 500 articles which were cited in petitioners' book, *Accusations of Child Sexual Abuse*. She reviewed the original source of the articles cited by the

petitioners before drawing any conclusions. The monograph challenges petitioners' findings in their book *Accusations of Child Sexual Abuse*, and is critical of the "leading and suggestive questioning" defense. Dr. Salter did not doubt the truth of any of her statements in the monograph at the time she authored it and, in fact, she still believes that all of her statements in the monograph are true.

Dr. Salter's monograph, entitled "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield," was submitted to the New England Association in January, 1990. The monograph was never traditionally published and has only been formally presented to the New England Association.

Dr. Salter provided the National Center for the Prosecution of Child Abuse (NCPCA) with a copy of her completed monograph in late 1990 or early 1991, for use in its role as a national clearing house and resource center on the investigation and prosecution of child abuse. The NCPCA has made copies of the monograph available to persons upon request at a cost which covers the copying and mailing expenses.

THE "60 MINUTES" TAPE

In the spring of 1990, Dr. Salter was approached by Mike Munro, a reporter for the television program "60 Minutes" of Australia, to be interviewed for a "60 Minutes" of Australia program regarding a child sexual abuse case in Australia known as the "Mr. Bubbles" case. The

defendant in the "Mr. Bubbles" case was accused of sexually abusing children who attended a nursery school run by his wife. He retained Dr. Underwager as one of his expert witnesses to testify at the pretrial hearing. The defendant was not committed for trial.

"60 Minutes" of Australia produced a story on the Mr. Bubbles controversy entitled "Witness for Mr. Bubbles" which concentrated on the testimony of Dr. Underwager. Dr. Salter was one of several persons interviewed for the program concerning her knowledge of Underwager's research and history as an expert witness in child sexual abuse cases. The program was originally broadcast in Australia on August 5, 1990, and includes interviews with Dr. Underwager, Attorney Charles Vaughan, Assistant United States Attorney James Peters, Sr., and Dr. Salter.

On October 31, 1990, a portion of the videotape of the "60 Minutes" of Australia program, "Witness for Mr. Bubbles," was played by Patricia Toth at a workshop at the Midwest Conference on Child Sexual Abuse and Incest in Madison, Wisconsin (Madison Seminar). Her workshop was directed at professionals involved in child abuse intervention and prosecution, including social workers, case workers, prosecutors, physicians, psychologists, and law enforcement personnel. Dr. Salter did not replay the videotape of that program or suggest that the videotape of that program be played at the Madison Seminar.

THE LOWER COURT PROCEEDINGS

Petitioners filed a defamation action against Dr. Salter, and others, on March 19, 1992 in the Western

District of Wisconsin. Petitioners assert that Dr. Salter's monograph and statements she made during the interview for the "60 Minutes" of Australia program defamed them.

On February 1, 1993, Dr. Salter moved for summary judgement. In a memorandum and order dated April 6, 1993, the District Court for the Western District of Wisconsin determined that petitioners were limited purpose public figures, but that there was an issue of fact as to whether Dr. Salter acted with actual malice.

On April 15, 1993 Dr. Salter filed a motion for reconsideration of the court's decision on the grounds that petitioners offered no evidence which demonstrated that a genuine issue existed as to actual malice. By order dated June 4, 1993, the Western District of Wisconsin court granted Dr. Salter's motion to reconsider and motion for summary judgment on the grounds that petitioners had failed to demonstrate clear and convincing evidence of actual malice and that no genuine issue remained for trial.

Petitioners filed a notice of appeal with the United States Court of Appeals for the Seventh Circuit on June 10, 1993. The appeal was argued on December 10, 1993 and the Seventh Circuit rendered a decision on April 25, 1994, affirming the decision of the lower court. Petitioners now seek review from this Court.

ARGUMENT

I. THE WRIT SHOULD NOT BE GRANTED BECAUSE THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR SUPREME COURT REVIEW.

The United States Supreme Court is a court of discretionary jurisdiction. "A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Although not inclusive, Rule 10.1 enumerates several considerations authorizing review of a petition.

Under that rule, Supreme Court review is appropriate when a United States court of appeals renders a decision in conflict with another court or has departed from the accepted and usual course of judicial proceedings. Additionally, review is considered when a state court of last resort has decided a federal question in a way that conflicts with another court or when a court has decided an important question of federal law which has not been settled by the United States Supreme Court. *Id.*

A principle purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

No such conflict is present in this case.

Petitioners assert that the rationale of the Seventh Circuit is in direct conflict with Wisconsin law. However, petitioners are in error. The Seventh Circuit's decision is in conformity with Wisconsin law on all points.

Therefore, this case presents no issue appropriate for Supreme Court review and the petition should be denied.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THE WISCONSIN COURTS.

A. Wisconsin Law Applies The Actual Malice Standard To Public Figures.

Petitioners would have the Court believe that the Seventh Circuit's decision violates *Erie Railway Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1983), asserting that it is in direct conflict with the case law precedent of Wisconsin. Petitioners are mistaken. The Seventh Circuit's decision was squarely on point with Wisconsin defamation law. It is noteworthy that petitioners do not argue that the Seventh Circuit erred in determining that they are limited purpose public figures for purposes of their defamation action. Rather, they claim that the court erred in applying the "actual malice" standard to non-media defendants asserting a privilege under Wisconsin common law. Petitioners analysis is flawed in two respects.

First, it is the plaintiff's status, not the defendant's, which determines the burden of proof applied in a defamation case. Second, in this case, the defendant's conduct is not to be examined under common law concepts of express malice, but the actual malice standard applicable to constitutional conditional privileges.

Petitioners erroneously declare that the actual malice standard is inapplicable to this case because the Wisconsin Supreme Court has "clearly asserted" that the *New York Times* standard does not apply to non-media defendants, citing *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982). In truth, Wisconsin courts have acknowledged that the actual malice standard is applicable to defamation actions by public figure plaintiffs, such as petitioners.

Petitioners seemingly suggest that *Denny, supra*, stands for the proposition that the "actual malice" standard only applies to media defendants. This is incorrect.

In *Denny*, the first question before the court was whether plaintiff was a public figure. *Id.*, at 643. After determining plaintiff was *not* a public figure for purposes of maintaining a defamation action, the court stated:

> We view the Mertz communication to Santry as coming within the standards applicable to private defamation actions. . . . We reaffirm our holding in Calero that *purely private defamations* are not entitled to constitutional protection. . . .

106 Wis. 2d at 660-61, [emphasis added]. Therefore, the court was considering the protection available to a private defendant who defamed a *private* plaintiff about a matter of purely *private* concern. However, the *Denny* court noted that different protections would apply to defendants in defamation actions by public figure plaintiffs about matters of public concern. *Id.* at 643-651.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this Court held that a

public figure may only recover for a defamation by proving actual malice. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 3008 (1974), the Court expanded the actual malice standard to cover persons who were "limited purpose" public figures.

Similarly, the Wisconsin Supreme Court has agreed that whether a plaintiff is "a 'public figure for all purposes' or a 'public figure for a particular controversy,' " he or she must establish that the defendant acted with actual malice in order to prevail in a defamation action. *Louis v. Coursolle Broadcasting*, 127 Wis. 2d 105, 119, 377 N.W.2d 166 (1985) (citation omitted).

Therefore, petitioners' assertion that Wisconsin law has concluded that the actual malice standard is not applicable to persons other than media defendants is inaccurate.

Second, petitioners claim that the Seventh Circuit applied the wrong standard of proof under Wisconsin common law. It is true that Wisconsin law recognizes that some communications are subject to non-constitutional conditional privileges. *See, Wis.J.I.Civil*, § 2500, at 9.

It is also true that Wisconsin has determined that proof of "express malice" is evidence of abuse of a non-constitutional conditional privilege. *Calero v. Del Chemical Corp.*, 68 Wis.2d 487, 500, 228 N.W.2d 737 (1974). However, the *Calero* court stated:

> The problem of actual malice arises in the cases involving First Amendment protection afforded to the media, such as newspapers, television, and radio, *or comments made about public officers or public figures.*

68 Wis. 2d at 500 [emphasis added]. It was in concluding that the actual malice standard did not apply to purely private defamation communications between private individuals that the *Calero* court applied the express malice test.

Additionally, under Wisconsin law, common law conditional privileges are distinguished from constitutional conditional privileges:

> A constitutional conditional privilege refers to the protection afforded media sources *(and also non-media persons, where the statement involves a matter of public interest or concern)* under the first amendment. . . . Where the plaintiff is a private individual, only negligence by the defendant media source or individual is required to be shown. *Denny v. Mertz, supra.* However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. *In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e.,* actual knowledge or with reckless disregard of whether the statement was true or false.

Wis.J.I.Civil, § 2500, p. 10-11 [emphasis added].

Further, *Dalton v. Meister,* 52 Wis. 2d 173, 188 N.W.2d 494 (1971) *cert. denied,* 405 U.S. 934, 925 S. Ct. 947 (1972), involved a defamation action brought by an assistant attorney general against a private businessman, not a media defendant. The court, noting that although the case was tried under defamation law concerning "conditional privilege," recognized that it could have been tried under the actual malice standard applicable to public figures. The court stated:

> The *Times/Sullivan* rule *is not confined to news media* and free press, but also applies to *private individuals* and free speech in some cases. *See St. Amant v. Thompson* (1968), 390 U.S. 727, 88 S.Ct. 323, 20 L.Ed.2d 262 . . . . Neither that question nor the burden of proof issue was raised in this case, but we might observe that even a casual reading of this record would lead one to believe as a matter of law that the proof of malice and knowledge of falsity or the reckless disregard of the truth was by clear and convincing evidence.

52 Wis. 2d at 183-184 [emphasis added].

Similarly, in *Polzin v. Helmbrecht*, 54 Wis.2d 578, 196 N.W.2d 685 (1972), the Wisconsin Supreme Court held that a private citizen, acting as a critic of the media, was entitled to the same protections as provided the media in the *New York Times* case, where the matter involved a public concern. In that case, defendant-appellant wrote a personal letter to an editor of the Fond du Lac *Commonwealth Reporter* expressing her opinion that articles concerning a local sewage controversy written by plaintiff-respondent, who was a reporter for the paper, were inaccurate and biased. The court stated:

> Clearly, [defendant] has the same constitutional right to express her opinion as the reporter.
>
> Thus, we concluded that the appellant is entitled to have the protection of the higher level of proof requiring plaintiff to convince the jury by clear and convincing evidence. She is also entitled to a jury determination of whether what was stated was published with "knowledge that it was false or with reckless disregard of whether it was false or not." Thus appellant is

> entitled to the protection of the standards required in the *New York Times* case.

Id., at 586.

The Seventh Circuit accurately noted that no Wisconsin cases involved an action by a public figure plaintiff against a non-media defendant. However, as the Seventh Circuit acknowledged, Wisconsin courts have clearly recognized that the actual malice standard articulated in *New York Times* is applicable to defamation actions brought by public figures against private individuals. Further, petitioners presented no arguments in either lower court suggesting that Wisconsin would impose a lesser burden on a public figure suing a psychologist or prosecutor than on one suing a media defendant. The Seventh Circuit correctly concluded that the "actual malice" standard was the proper burden of proof in this case.

B. The Seventh Circuit Correctly Determined That Republication Of Defamatory Matter Is Not Evidence Of Actual Malice.

Petitioners allege that they submitted ample evidence which demonstrated the existence of actual malice on the part of Dr. Salter. They claim Dr. Salter's deposition testimony that she made copies of the "Mr. Bubbles" tape and sold it to interested persons for $12 a copy is "direct compelling evidence" of actual malice. A review of the actual malice standard is necessary to show why petitioners' "evidence" is insufficient to prove actual malice.

> Actual malice has been defined as knowledge that the statement was false, or reckless disregard as to whether it was false. . . . The focus is

> upon the defendant's attitude pertaining to the truth or falsity of the published statements rather than upon any hatefulness or ill will [citation omitted]. The plaintiff must show "that the defendant, in fact, entertained serious doubts as to the truth of his publication."

Van Straten v. Milwaukee Journal, 151 Wis. 2d 905, 917, 447 N.W.2d 105 (Ct. App. 1989), *cert. denied*, 496 U.S. 929 (1990). "Proof of actual malice, therefore, depends upon the defendant's actual state of mind." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 489 (7th Cir. 1986). In *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) the court stated:

> The actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. . . . We have made clear that the defendant must have made the false publication with a "high degree of awareness of . . . probably falsity."

Id. at 2685-86 [citation omitted].

Petitioners argue that republication of a defamation demonstrates "ill will" and that "ill will" is evidence of "actual malice." In support of this assertion, petitioners cite the West Virginia Supreme Court decision *Hinerman v. Daily Gazette Co., Inc.*, 423 S.E.2d 560 (W.Va. 1992). However, this case does not support petitioners' position. In *Hinerman, supra*, the court stated:

> The greatest obstacle that a public official libel plaintiff must overcome is the First Amendment requirement that the publisher of a libel against a public official have a *subjective appreciation* at the time of the publication that either (1) the

> defamatory statement is false or (2) the defamatory statement is being published in reckless disregard of whether it is false.

423 S.E.2d at 572.

This case clearly requires that a public figure plaintiff demonstrate that the publisher had a subjective appreciation that statements he or she made were false. Further, in *Van Straten, supra,* the Wisconsin court specifically held that the defendant newspaper's continued publication of allegedly defamatory statements did not constitute "actual malice." 151 Wis. 2d at 917-918. Therefore, under Wisconsin law, republication of defamatory matter is not evidence of "actual malice." The Seventh Circuit correctly found that petitioners did not meet their burden.

Similarly, petitioners' allegation that Dr. Salter's distribution of the "Mr. Bubbles" tape begs the question whether Dr. Salter acted with "actual malice." Petitioners do not specify why Dr. Salter's distribution of the tape to other persons supports a finding of actual malice. That Dr. Salter provided the tape to others does not support the conclusion that Dr. Salter made statements which she knew were untrue or acted with the reckless disregard as to their truth. In fact, if Dr. Salter doubted the veracity of her statements, there would be no point in providing copies of the tape to persons having a legitimate use for that tape.

In support of her motion for summary judgment, Dr. Salter offered evidence demonstrating that *she entertained no doubts as to the truth* of any of her statements in her monograph or on the "60 Minutes" tape. Dr. Salter testified that in preparing her monograph, she spent over 18

months reviewing over 500 articles cited by the petitioners in their book *Accusations of Child Sexual Abuse*. She reviewed each original study or article cited by the petitioners before drawing any conclusions as to each article. Forty-five pages of Dr. Salter's monograph document the facts she relied upon in making her allegedly defamatory statements. In fact, Dr. Salter testified that she still believes every comment she made in the monograph is true.

Second, Dr. Salter testified that every comment she made during the "60 Minutes" interview was made in good faith and that she entertained no doubts as to their truth. She made the statements based on her professional opinion and scholarly conclusions after extensive research and investigation of Dr. Underwager's work, research, court testimony and the relevant professional literature. Dr. Salter still believes that each of those comment are true.

CONCLUSION

The decisions of the Seventh Circuit and the United States District Court for the Western District of Wisconsin are correct. This case merely involves the application of Wisconsin law to a standard defamation claim and is not an appropriate candidate for review by the United States Supreme Court. Thus, this respondent respectfully

requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BELL, METZNER, GIERHART
& MOORE, S.C.

JOHN M. MOORE; No. 1010235
JOHN W. MARKSON; No. 1018620
(Counsel of Record)
TERESA A. MUELLER; No. 1019539

44 East Mifflin Street
Suite 1000
P.O. Box 1807
Madison, WI 53701
(608) 257-3764

Attorneys for Respondent
Dr. Anna Salter

September 23, 1994

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1994

RALPH UNDERWAGER, AND
HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH,
MIMIM ROSE, NATIONAL CENTER
FOR PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, CHARLES VAUHGAN,
AND JAMES PETERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT CHARLES R. VAUHGAN IN OPPOSITION

September 23, 1994

Hamid R. Kashani
Suite 600
445 N. Pennsylvania Street
Indianapolis, IN 46204
317/ 632-1000

Counsel of Record
for CHARLES R. VAUHGAN

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STATEMENT OF THE CASE

The relevant facts to the question addressed by this brief in opposition are as follows:

1. Petitioners Underwager and Wakefield, both psychologists, have written two books in which they "conclude that most accusations of child sexual abuse stem from memories implanted by faulty clinical techniques rather than from sexual contact between children and adults. The books have not been well received in the medical and scientific press." *Underwager v. Salter*, 22 F.3d 730, slip op. at 1-2 (7th Cir. 1994).

2. Munro and "60 Minutes" of Australia produced a television program highly critical of Underwager and Wakefield. In 1990, this program was broadcasted in Australia. During his interview for this program, Vaughan "made defamatory statements which became part of the program." Vaughan, however, "had no control over the broadcast of the program." District Court's Memorandum and Order at 3 (Jul. 16, 1992) (a-3).

3. Underwager and Wakefield sued Vaughan in the United States District Court for the Western District of Wisconsin.

4. "Vaughan is an Indiana attorney. He does not solicit business in Wisconsin and has no clients, employees, agents or property in the state." *Id.*

5. Pursuant to Fed. R. Civ. P. 12(b)(2), Vaughan moved to dismiss for want of personal jurisdiction. The district court agreed that "[t]he allegations and undisputed facts before [it] established that the [Wisconsin's] long arm statute does not provide for personal jurisdiction over [Vaughan] and that, in any

event, due process would preclude the exercise of jurisdiction." *Id.* at 5 (a-5).

6. Underwager and Wakefield appealed. The Court of Appeals affirmed. Vaughan did not do "anything in Wisconsin, sent anything into Wisconsin, [n]or had any way of knowing that a segment of an Australian TV series would end up being shown at a seminar in Wisconsin." *Underwager*, 22 F.3d at ___, slip op. at 4.

REASON FOR DENYING THE WRIT WITH RESPECT TO CHARLES R. VAUGHAN

Petitioners have waived their right to challenge the decisions of the district court and the court of appeals in dismissing Petitioners' claims against Vaughan for want of personal jurisdiction.

Pursuant to Sup. Ct. R. 14.1(a), "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." The Petition neither contains an argument challenging, nor does it even mention, the district court's dismissal of Vaughan and the court of appeals' affirmance thereof. Therefore, Petitioners have waived their right to litigate that question before this Court. "Absent unusual circumstances, . . . , we are chary of considering issues not presented in petitions for certiorari." *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

CONCLUSION

For the foregoing reasons, Respondent Charles R. Vaughan respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

September 23, 1994

Hamid R. Kashani
Suite 600
445 N. Pennsylvania Street
Indianapolis, IN 46204
317/ 632-1000

Counsel of Record
for Charles R. Vaughan

APPENDIX*

The District Court's
Memorandum and Order (Jul. 16, 1992) . . . a-1

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*The appendix to the Petition does not include all the materials required by Sup. Ct. R. 14.1(k)(i).

(REPRODUCED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Plaintiffs,

v.

MEMORANDUM AND ORDER
92-C-229-S

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH
INSTITUTE, NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, MIKE
MUNRO, CHANNEL 9 AUSTRALIA,
"60 MINUTES" OF AUSTRALIA,
CHARLES VAUGHAN, and JAMES
PETERS, SR.

Defendants.

Plaintiffs Ralph Underwager and Hollida Wakefield bring this action alleging defamation and conspiracy to injure against the defendants based upon certain publications and statements which allegedly impugned their professional capabilities. The matter is presently before the Court on the motion of defendants Mimi Rose, Charles Vaughan and James Peters, Sr. to dismiss for lack of personal jurisdiction. Also before the Court is a motion by defendant National Center for Prosecution of Child Abuse to dismiss pursuant to Rule

9 (a) asserting that it lacks capacity to be sued, and a motion pursuant to Rule 12(b)(6) advanced by defendants Patricia Toth, Mimi Rose, National Center for Prosecution for Prosecution of Child Abuse, American Prosecutors Research Institute, National District Attorneys Association, and James Peters, Sr. challenging the sufficiency of the claim based upon conspiracy to injure under § 134.01, Wis. Stat.

Jurisdiction is based on 28 U.S.C. § 1332. The following is a summary of the factual allegations of the complaint, together with facts from the affidavits offered in support of the 12(b)(2) motions.

FACTS

Plaintiff Ralph Underwager is a Minnesota resident and a licensed psychologist. Since 1984 plaintiff Underwager has engaged in consulting and evaluation concerning civil and criminal litigation involving charges of child sexual abuse. In 1988 he published a book entitled "Accusations of Child Sexual Abuse" which was disseminated throughout the United States.

The plaintiff Hollida Wakefield is a licensed psychologist and the administrator of the Institute for Psychological Therapies in Northfield, Minnesota.

The defendant American Prosecutors Research Institute (APRI) is a non-profit research organization affiliated with the National District Attorneys Association with offices of Virginia. The defendant National Center for Prosecution of Child Abuse is an unincorporated program of defendant APRI which has no employees of its own, but is operated by employees of defendant APRI.

Defendant Patricia Toth has been employed by APRI since 1989 as the Director of defendant National

Center. Defendants James Peters and Mimi Rose were employed by defendant APRI as senior staff attorneys for defendant National Center during the period relevant to this complaint. Neither defendant Peters nor defendant Rose has ever been to Wisconsin, nor did either solicit or conduct business in the state.

Defendant Anna Salter is a psychologist and a resident of New Hampshire. In 1990 defendants Peters, Toth and Rose, acting as agents of defendant APRI, caused defendant Salter to be hired to write a monograph directed at challenging the plaintiffs' book, "Accusations of Child Sexual Abuse." Defendant Salter drafted the monograph which included defamatory statements injuring the plaintiffs. Defendant Salter provided the monograph to defendants Peters, Toth and Rose for distribution through defendant National Center for Prosecution of Child Abuse. Neither defendant Peters nor defendant Rose distributed the monograph into Wisconsin.

Defendant Charles Vaughan is an Indiana attorney. He does not solicit business in Wisconsin and has no clients, employees, agents or property in the state.

Prior to September 1990 the defendants Mike Munro and "60 Minutes" of Australia produced a television program which included defamatory statements about the plaintiffs and was broadcast in Australia in September 1990. Defendants Peters, Vaughan and Salter were interviewed for the television program and made defamatory statements which became part of the program. Defendants Peters and Vaughan had no control over the broadcast of the program.

Between October 29 and November 1, 1990, defendant Toth played the videotape of the "60 Minutes" program at the Midwest conference on Child Sexual Abuse and Incest, at Madison, Wisconsin. In November

1990 defendant Rose played the videotape at a conference in Illinois, and in 1991 defendant Rose played the videotape at a conference in Arizona.

MEMORANDUM

The Court addressed defendants' procedural and jurisdictional challenges prior to addressing the substantive motions under Rule 12(b)(6), Federal Rules of Civil Procedure.

Rule 9(a) Motion of National Center

The defendant National Center for Prosecution of Child Abuse moves to dismiss the complaint against it on the ground that it is not a party subject to suit within the meaning of Rule 17, Federal Rules of Civil Procedure. The complaint alleges that National Center is a "program of the defendant American Prosecutors Research Institute." Defendants establish by affidavit of Toth that the National Center is operated by employees of APRI and has no employees of its own. Furthermore, the program is funded by a grant received by APRI which is used to operate the National Center.

Under these circumstances it is clear that dismissal of the National Center as a defendant is appropriate. The facts establish that the Center is merely an arm of defendant APRI, which is a legal entity subject to suit, and that the activities of the National Center are, in fact, activities of employees of APRI. Where the actual legal entity is named as a defendant, it is appropriate to dismiss a nominal entity such as the National Center for Prosecution of Child Abuse. Testa v. Janssen, 482 F.Supp. 1195, 1200 (W.D. Pa. 1980).

Personal Jurisdiction Motions

Defendants Rose, Peters and Vaughan move to dismiss the complaint against them pursuant to Rule 12(b)(2) asserting the absence of personal jurisdiction. Personal jurisdiction in a diversity action is determined by reference to the Wisconsin long arm statute. If personal jurisdiction is appropriate under the long arm statute, the Court then considers whether jurisdiction is consistent with constitutional limits. Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1195, (1985). The allegations and undisputed facts before the Court established that the long arm statute does not provide for personal jurisdiction over the moving defendants and that, in any event, due process would preclude the exercise of jurisdiction.

The provisions of the long arm statute relied upon by the plaintiffs in support of personal jurisdiction is § 801.05(3), Wis. Stat., which provides:

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s.801.11 under any of the following circumstances:
>
> * * *
>
> (3) LOCAL ACT OR OMISSION. In any action claiming injury to person or property within or without this state arising out of an act or omissions within this state by the defendant.

It is undisputed that defendants Peters and Rose have never set foot in the State of Wisconsin and that defendant Vaughan owns no property and solicits no business in the state. It is further undisputed that they do not transact business in Wisconsin, nor have they directed any publications or broadcasts into

Wisconsin. Recognizing these facts plaintiffs assert two theories for expanding the meaning of "an act or omission of Wisconsin." First, plaintiffs allege that the videotape interviews of the defendants Vaughan and Peters constitute an act within the State of Wisconsin, "by electronic means." Plaintiffs offer no support for this novel theory. Under this theory and recorded statement would constitute an act within Wisconsin if the statement into Wisconsin, and, as will later be seen, such an interpretation of the Wisconsin long arm statute would be violative of due process rights.

The second theory advanced by the plaintiffs as to defendants Rose and Peters is that they were a part of a conspiracy and, therefore, the action of defendant Toth in playing the videotape in Wisconsin can be attributed to them. This theory is equally unpersuasive in light of the fact that defendants Toth, Rose and Peters were all employees of the same organization, defendant APRI, who were acting within the scope of their employment when distributing information and conducting seminars. Under such circumstances, the acts of the defendants are acts of their employer organization and cannot support a claim of conspiracy. Elbe v. Wausau Hospital Center, 606 F.Supp. 1491, 1502 (W.D. Wis. 1985). A business organization and its employees cannot conspire with one another in furtherance of the business organization's purpose. Id. For purposes of determining personal jurisdiction, the defendants' contacts with Wisconsin are not to be judged according to their employer's activities, but each defendant's contacts with the State must be assessed individually. Calder v. Jones, 465 U.S. 783, 790 (1984). Since none of the moving defendants participated in the publication of the alleged defamatory statements in Wisconsin, those actions cannot be attributed to them for purposes of personal jurisdiction.

Assuming the Wisconsin long are statute could be stretched to encompass defendants Vaughan, Peters and Rose, the due process clause would certainly preclude it. The most analogous Supreme Court decision is Calder v. Jones, where the Supreme Court permitted the exercise of personal jurisdiction by a California court over a reporter and an editor of the National Enquirer who had made personal trips to California and caused to be published an article concerning actions that occurred in California which impacted foreseeable on the plaintiff who resided in California. Under these circumstances the Supreme Court held that the due process clause of the Fourteenth Amendment would not be violated by asserting personal jurisdiction over the defendants.

The facts of this case starkly contrast with those of Calder. None of the defendants' actions concerning the statements occurred in Wisconsin, the defendants did not reside in Wisconsin, and the publications were not directed to Wisconsin. None of the bases for asserting personal jurisdiction in Calder are present in this case. The assertion of personal jurisdiction in Wisconsin over defendants who have never been in Wisconsin and who did not direct any publication into the State in a suit involving injury to a Minnesota plaintiff would unquestionably offend traditional notions of fair play and substantial justice. Id. at 788.

The motions of defendants Peters, Rose and Vaughan to dismiss for lack of personal jurisdiction must be granted.

Motion to Dismiss Claim Under § 134.01, Wis. Stat.

The defendants American Prosecutors Research Institute and patricia Toth move to dismiss the claim under Wisconsin law, § 134.01, Wis. Stat., based upon a conspiracy to injure asserting that neither malice nor

conspiracy has sufficiently been alleged. The Court finds that this motion can be granted as to defendant Toth, but not as to the defendant APRI.

Wisconsin Statute § 134.01 makes it unlawful for any two or more person to "combine, associate, agree, mutually undertake, or consort together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession by an means whatever. . ."

As it concerns the defendant Toth, the allegations of the complaint fail to state a claim because they fail to allege a conspiracy in which she is involved. The only allegations of the complaint which allege concerted activities by separate defendants are the allegations that defendants Toth, Peters and Rose, acting as agents of APRI, caused defendant Salter to draft a monograph which they later received and distributed. The complaint does not allege, nor can a reasonable inference be made, that the actions of Toth concerning the monograph were not in furtherance of her employer's purpose or outside the scope of her employment. The limited actions concerning the monograph taken by Toth in furtherance of her employment with APRI cannot form the basis of a claim of conspiracy against her. Elbe, 606 F.Supp. at 1502.

The allegations are sufficient, however, to support a claim that defendants Salter and APRI agreed or mutually undertook to create and distribute the monograph.

Additionally, the allegations of the complaint are sufficient to allege that such actions were taken "willfully or maliciously" to damage the reputation of plaintiffs. Defendants APRI's argument to the contrary relies upon a sleight of hand application of Rule 9(b), Federal Rules of Civil Procedure. Rule 9(b) permits

allegations of malice to be averred generally as in paragraph 21. Furthermore, the fact that there was apparently no pecuniary gain accruing to the defendant APRI as a result of the publication's statements against the plaintiffs makes it reasonable to infer that such actions were taken for the willful purpose of injuring plaintiffs' reputations.

Defendant APRI's assertion that the "circumstances" must be pled in "detail" is clearly a distortion of Rule 9(b), which imposes such a requirement on allegations of fraud or mistake, but expressly does not impose such a requirement on allegations of malice or intent. For obvious reason, the requirement of particularity applicable to fraud cannot be imposed upon allegations of the defendants' state of mind which generally cannot be established by direct evidence but must be inferred from surrounding circumstances. Malice and conspiracy have been sufficiently alleged against defendant APRI and its motion to dismiss must be denied.

ORDER

IT IS ORDERED that the motion of defendant National Center for Prosecution of Child Abuse to dismiss pursuant to Rule 9(a) based upon lace of capacity to be sued is GRANTED.

IT IS FURTHER ORDERED that the motions of defendants Mimi Rose, James Peters, Sr. and Charles Vaughan to dismiss pursuant to Rule 12 (b)(2) for lack of personal jurisdiction are GRANTED.

IT IS FURTHER ORDERED that defendant patricia Toth's motion to dismiss the claim based upon Wis. Stat. § 134.01 is GRANTED.

IT IS FURTHER ORDERED that defendant's APRI's motion to dismiss the claim based upon Wis. Stat. § 134.01 is Denied.

Entered this 16th day of July, 1992.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Court

The first page of this memorandum and order contains the following information:

> Copy of this document has been mailed to the following: Attys. Sutton, Moore, Zaleski, Arntsen, Keller, and Vaughan this 16th day of July, 1992.
>
> /s/
>
> By: _____
> Secretary to Judge John C. Shabaz

MOTION FILED

SEP 20 1994

No. 94-314

In the

Supreme Court of the United States

October Term, 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE,
NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTOR'S RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS' ASSOCIATION,
CHARLES VAUGHAN AND JAMES PETERS,

Respondents.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE VOCAL ORGANIZATIONS, INC. IN SUPPORT OF RALPH UNDERWAGER AND HOLLIDA WAKEFIELD, PETITIONERS

M. Cristina Gutierrez
Counsel of Record
WILLIAM H. MURPHY, JR.
& ASSOCIATES, P.A.
1007 North Calvert Street
Baltimore, Maryland 21202
(410) 539-6500

Attorney for Amicus Curiae
National Association of State VOCAL Organizations, Inc.

1994 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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No. 94–314

In The
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RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,
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vs.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE
NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTOR'S RESEARCH INSTITUTE.
NATIONAL DISTRICT ATTORNEYS' ASSOCIATION.
CHARLES VAUGHAN AND JAMES PETERS
Respondents

On Petition for Writ of Certiorari to the
Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of State VOCAL Organizations, Inc. represents over 115 state and local VOCAL groups and hereby respectfully moves for leave to file the attached brief *amicus curiae*. The attorney for the plaintiffs has consented. One firm of attorneys for the respondents has rejected our request for their permission to file the brief. The stated reason for the refusal is ". . .the filing of an Amicus Curiae brief by you would be primarily for political purposes and will not

bring to the attention of the Court matters which will not be submitted by the parties." Mr. Vaughn refused permission claiming the action was frivolous lawsuit. His letter also carries the heading "Re: Letter from your organization on behalf of child abusers". Mr. Vaughn demonstrates in his letter of refusal the most important reason for our filing this brief. He asserts that NASVO is an organization protecting and representing guilty child abusers. The Respondents consistently attack, defame, and slander anyone who attempts to speak up for reason, balance, and accuracy in dealing with child abuse. This is the Monopoly Theory of justice. When accused, "Go to Jail. Go Directly to Jail." Do not stop for a claim of fair and equitable justice.

This brief supports the plaintiffs' petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The National Association of State VOCAL Organizations, Inc. has ten years of experience in attempting to respond to the needs of persons falsely accused of child abuse and their friends and families who observe the devastation and harm done and become alarmed by what they see happening. When even Readers' Digest titles an article about the system dealing with child abuse "Justice Gone Crazy"[1], it is time to begin to ask what is going on that there should be such a perception? NASVO daily fields calls and contacts from persons all over this land who firmly believe that the system of justice they have experienced or observed is unfair, tyrannical, and oppresive. We hear again and again the belief that what social workers, police, prosecutors, and judges do when dealing with child abuse allegations is like the Nazi storm troopers or the KGB. NASVO works hard to channel the frustration, resentment, and anger of this ever

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[1] Armbrister, T. (1994, January). Justice gone crazy. Reader's Digest, pp. 33–40.

growing number of American citizens into constructive and responsible efforts to improve the system. We strive to support the concept of increasing the accuracy of the decisions made by the justice system. It can hardly be denied that greater accuracy benefits everybody. Yet, the gains made are small, scattered, and require sustained and serious comittment by VOCAL members.

We are also very aware of the bitter and cynical view that more and more American take of their political structure. We know that almost every current political commentator believes there is a large group of citizens who believe the political process is a sham and a hoax. We know that politicians also express dismay about the level of rancor and animosity that now pervades public discourse. The personal attacks made on almost every public figure include a growing level of falsehood, defamation, misinterpretation, exaggeration, and vitriol. We believe the justice system must lead the way and set an example of valuing truthfulness, fairness, honesty, and a reasoned cooperative search for justice by all parties in disputes. Therefore, this case offers the Court an opportunity to seek an advance in restoring civility and reason to our public dialogues and to increase the accuracy of the decision making process of the entire justice system.

We do not understand the objection of respondents that filing this brief is for political purposes and therefore they would deny us access to the system of justice. What other recourse does a citizen have? The District judge already rejected the defendants's motion to find the suit a frivolous action and ruled it was not. Mr. Vaughn's reason for refusing our request for permission does not accept that judgment.

For the foregoing reason, the National Association of State VOCAL Organizations, Inc. respectfully urges the Court to accept and file the enclosed brief *amicus curiae* in support of the petitioners, Ralph Underwager and Hollida Wakefield.

Respectfully submitted,

M. Cristina Gutierrez
William H. Murphy, Jr. & Associates, P.A.
1007 North Calvert Street
Baltimore, MD 21202
(410) 539–6500

Attorney for Amicus Curiae,
National Association of State VOCAL Organizations, Inc.

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No. 94–314

In The
Supreme Court of the United States
October Term, 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,
Petitioners

vs.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE
NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE,
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CHARLES VAUGHAN AND JAMES PETERS
Respondents

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Brief of the
National Association of State VOCAL Organizations
as Amicus Curiae
in support of the Petitioners.

Interest of Amicus Curiae

This *Amicus Curiae* brief is submitted by the National Association of State VOCAL Organizations, Inc. (NASVO), which represents, as their national entity, 115 chapters of differing state organizations of VOCAL, or Victims of Child Abuse Laws. NASVO acts as a coalescent association that

provides information and professional guidelines to VOCAL organizations. NASVO was originally formed in 1987 to bring together the various VOCAL chapters throughout the country to represent VOCAL's concerns regarding the laws affecting families and children on a national level, rather than state by state. NASVO has convened several conferences in Washington, D. C. to bring together government officials, political figures, and concerned citizens and continues to sponsor such conferences.

Originally founded in 1984, VOCAL, in the beginning, consisted primarily of parents who were falsely accused of abuse or neglect, usually during a custody battle in family court. Then, relatives, friends, and concerned citizens who were alarmed by what they saw happening to families and friends became involved in VOCAL. Soon, other individuals who worked with children joined VOCAL, such as teachers, foster parents, and social workers who had found themselves observing and feeling the sting of false accusations. Many suffered not only the loss of reputation, jobs, and financial security, but most often the loss of their children. Even after acquittal, or a finding by a court that the accusation was unfounded and false, the damage to these families was total and devastating. In the late 1980s VOCAL also began receiving calls from children who languished in foster care and whose concerns were never addressed by their social worker or their guardian ad-litem. VOCAL also received complaints about child protection services regarding understaffing, lack of available time to assess cases or for contact with clients, unreasonable case-loads, and coercion to conform to ideological positions from those who worked within child protection agencies,.

After researching the issue of child abuse and neglect, VOCAL realized that while the need to protect children is paramount, the method in which government intervened on

behalf of children was more often damaging to children and families rather than beneficial. Since 1979, every scientific analysis of the level and kind of error committed by the system has reached the same conclusion. The error is an unconscionable level of false positives ranging from the lowest figure of three false positives to every true positive to over 200 to 1.[1] Such unanimity in science across so many years and differing investigators is strong evidence for the need to improve what is done to respond to accusations of child abuse. VOCAL also became acutely aware of the need for an accountable, professional child protection system from the first report through the investigation and intervention. There is need for an educated judiciary and the need to bring about equity to all, including families and children, under the law. At that point VOCAL began a national crusade to *improve* child welfare and protection policy and law. The basic goal of VOCAL is to increase the accuracy of the decision making process throughout the system and at all levels. The representative of VOCAL's viewpoints to these national issues is NASVO.

NASVO has the experience of dealing with thousands of people who have been accused, determined *not* to have abused any child, but whose experience has convinced them that the present justice system dealing with this issue is unjust, and does not protect them but rather denies their constitutional rights. While NASVO supports the justice system in it's efforts to seek truth, to punish the guilty and acquit the innocent, we must deal with the perception of these thousands of citizens that the experience of being falsely accused of child abuse was not one in which they met a judicial system that was fair. Regardless of

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[1] Wakefield & Underwager (1994) The alleged child victim and real victims of child sexual abuse. In Krivacska & Money,*The Handbook of Forensic Sexology*, New York, Prometheus Books, 223–264.

the outcome, they feel they were treated as though considered guilty and that the burden was upon them to prove their innocence. They feel that the constitutional protection against unwarranted search and seizure, and that right of their children, had been relinquished through accusation alone. They feel that due process and equal access to the courts is an illusion, in that only those who can pay for justice receive it, and even then justice is only meted out to those who are not ground into dust by the overwhelming powers and resources held by the state. NASVO/VOCAL presents this Amicus Brief out of concern for the rights of the accused and children to due process under the law and to move toward our goal of increased accuracy of decision making. We feel that should the lower court's decision in this case be upheld, there will be a critical effect not only upon the court system's balance, but on the constitutional rights of the accused. We also believe that letting stand the lower court's imposition of the heightened standard of actual malice applied to prosecutors and their allied scholars cannot help increase accuracy but rather can serve only to increase the unacceptable level of error already demonstrated by scientific analysis. The tragic consequences of inaccuracy and error are shown in the death of 86 American citizens under the treads of American battle tanks as a result of a faulty decision made by the Attorney General of the United States. That fatal decision was based upon believing a false report of child sexual abuse. That false report was developed by the techniques and methods accepted and supported by the prosecutors and the National Center for the Prosecution of Child Abuse but challenged and questioned by the Plaintiffs.

BACKGROUND

The case of *Underwager and Wakefield v. Salter, et. al*, concerns the defamation of expert witnesses who testify primarily for the defense in child abuse cases. The defamation

was disseminated by the Defendants to prosecutors and other interested parties throughout the country at various conferences and seminars, both at these meetings and by mail. The lower courts have found that the Defendants-Appellees are immune under standards of law that require the Plaintiff's to prove "actual malice" under *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 686 (1964), that they are immune under the "common interest privilege"as defined in section 596 of the Restatement 2d of Torts, and that their defamation is based upon "true belief" that it is factual, and is backed by articles published by others involved in child abuse law.

We regard this case as much more than a simple defamation issue. In order to understand that this is not just a case regarding defamation, one must look at the history of child abuse law, and the evolution of the rules of evidence in these cases. While states differ, much ground has been covered in this area. Soon after the enactment of the *Child Abuse Prevention and Treatment Act* (the Mondale Act) of 1973, the country began to witness an industry growth in the area of experts and agencies who claimed to be "child advocates". Some of these early experts provided information to courts as "proof" that a child had been abused, or that the accused was an abuser, by fitting a "profile" claimed to be typical of abused children. Based upon that kind of information (which in those early years was not disputed), a majority of those accused of child abuse found themselves convicted. Later, case law began to catch up to this new area of evidence and procedure, and indeed found that statements regarding a "profile" by an expert expressed to a jury or finder of fact was prejudicial in that it "invaded the realm of the jury", and made a determination that the defendant was guilty based upon the prosecution expert's own personal judgment. Other cases were overturned because of the use of the "Child Sexual Abuse Accommodation Syndrome" Summit, Roland S., M.D. *Child Abuse & Neglect* Vol. 7, pp. 177–193 (hereafter cited as

the CSAAS), which now is not admissible in court in some states to show that a particular child was a victim of sexual abuse. *See Hellstrom v. Commonwealth*, 825 S.W. 2d 612 (Ky. 1992); *People v. Knupp*, 579 N.Y.S.2d 801 (N.Y. App.Div. 1992); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992); *State v. Dodson*, 452 N.W.2d 610 (Iowa Ct. App. 1989).

The most recent decision in this direction has been in *State of New Jersey v. Michaels*, 264 N.J. Super. 579, 625 A.2d 489 (1993), where the New Jersey Superior Court, Appellate Division ruled that the CSAS and the CSAAS were controversial theories and could not be used to prove sexual abuse. The court followed a decision handed down a month before by the New Jersey Supreme Court, which adopted the conclusion that, "The proper use of child-abuse expert testimony is... not as a diagnostic investigative device, as the syndrome does not detect the sexual abuse." The Superior Court in its decision stated, "It would appear that the prospect of designing checklists, inventories and rating scales to provide objective measures of abuse behavior, its antecedents, correlates, and consequences, hold promise of yielding information that may be useful both in individual and epidemiological data gathering. Designing and validating such measures, however, depends on theory and research that is currently the focus of much study and controversy." Such controversy is part of our growth into knowledge.

We must add that on June 23, 1994, the New Jersey State Supreme Court again ruled in Michaels' favor, regarding the efforts of the prosecution to retry the case, basing it's decision upon the problems established by the repeated and coercive nature of the interview techniques of the prosecution imposed upon the children. *State v. Michaels*, 136 N. J. 299, 642 A.2d 1372 (1994). The New Jersey Supreme Court ruling adopts and affirms the substance of the testimony given by Plaintiffs in

that trial. They were the experts for the defense. The New Jersey Supreme Court also speaks of ". . .the egregious prosecutorial abuses evidenced in this record." 642 A.2d at 1385. In the trial the prosecution made savage personal attacks on the Plaintiff and twice in the presence of the jury described the way the prosecutors were building a book on the Plaintiffs to make sure they would never again testify in a trial in the U. S..

Such cases clearly show the efforts of the judicial process in seeking remedies to problems that promote criminal acts or victimize members of our society. The seeking of information is vital to this process. One basis for determining the validity of information was known as the "Frye Standard" holding that a scientific technique is not admissible unless the technique is "generally accepted" in the scientific community. *Frye v. United States*, 293 F. 1013 (1923). Only after a technique had passed through an "experimental phase" where it is scrutinized by the scientific community and has entered into the "demonstrable" stage, could it be admissible. However, this standard had problems because under the Frye rule, it is not enough that a qualified expert or experts believe the technique is valid. It must be accepted by the relevant scientific community. This created more controversy and also a vacuum in efforts to seek information, particularly in child abuse cases.

Then new case law gave precedent to the method in which courts could hear more information, allow more argument as to the application of expert testimony, and would be allowed to draw clearer conclusions based upon testimony and evidence presented. In *Daubert v. Merrell Dow Pharmaceutical, Inc.*, Supreme Court of the United States, No. 92-102 (filed June 28, 1993), the courts are provided guidelines with which to determine the "falsifiability" of new scientific or mental health developments provided to courts as evidence. This process allows for the free exchange of new information, and the

examination *by the court* as to it's applicability and validity to a case before the bar, rather than waiting on the process of general opinion and acceptability of the professional community, which is often tainted by the politics and popular cause of the day, rather than fact.

We point this out to establish the importance of expert witness testimony, and that to eliminate information from one point of view (in this case, the defense of child abuse cases) endangers the process by which we seek information to achieve justice.

SUMMARY OF ARGUMENT

While the U. S. District Court and the Court of Appeals for the Seventh Circuit upheld the claims of the Defendants-Appellees for summary judgment, they did find that the acts of the Defendants-Appellees certainly were defamatory and malicious, but granted them immunity under *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 686 (1964). It is apparent that these courts erred in this conclusion in light of the fact that the Respondents-Appellees had gone beyond the "common-interest privilege" through the dissemination of this information to those individuals who were not involved in the prosecution of these cases, by virtue of publicly attended seminars and conferences. The defendants also distributed their defamatory material to anyone, professional or not, who wanted to attack the plaintiffs. They also distributed the defamatory material in foreign countries. The court also believed that the published critiques of the Petitioners-Appellants' work, which supported the "beliefs" held by the Respondents-Appellees, were the opinions of unbiased, independent professionals, when in fact these critics are colleagues of the Respondents through the American Professional Society on the Sexual Abuse of Children (APSAC), an organization that is also prosecution-oriented.

This case also goes beyond a normal defamation case in that the Respondent-Appellees have a specific goal to attack the reputation of *any* defense expert witness by "making them commercially undesirable", and thus establishing only prosecutorial experts as the sole means by which a court of law can access information and research regarding the difficult and highly sensitive issues surrounding child abuse cases. Because any defendant has the right to bring forth evidence and witnesses on his or her behalf that will enable him to provide a viable, factual, basis from which to establish his innocence, and that this is an integral part of due process, to impeach and attack defense expert witnesses through innuendo, gossip, and defamation, is a direct violation of that due process.

ARGUMENT

I. The issue regarding the respondents' defamatory acts, acts already determined by the lower courts as fact, is clearly not immunized under the provisions set forth in *New York Times v. Sullivan,* due to past and present actions by the respondents, and are further not protected under the "common interest privilege".

Twice in the District Court, the actions of the Respondents were determined to be defamatory as a fact of law, and twice the Appellate Court described the acts by the Respondents as defamatory. Yet, in this case, the Respondents were given qualified immunity under a state common law of defamation that does not require it, by requiring the Plaintiff's to meet the "actual malice" standard test presented in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 686 (1964). Also discussed by the Appellate Court was the "common interest privilege" as defined in section 596 of the Restatement 2d of Torts. *See Zinda v. Louisiana Pacific Corp. and Hartford Accident and Indemnity*, 440 N.W.2d 548 (Wis. 1989).

> An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest has a right to know. . . .
>
> . . . The common interest privilege is based on the policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common. Thus, defamatory statements are privileged which are made in furtherance of common property, business, or professional interests. The Restatement extends such privilege to partners, fellow officers of a corporation for profit, fellow shareholders, and fellow servants'. . . .

Converters Equipment Corp. v. Condes Corp., 80 Wis. 2d at 264, 258 N.W.2d 712 (1977).

Respondent Toth, armed with information provided by Respondent Salter, represents the interests of prosecutors involved with child abuse cases through the National Center for the Prosecution of Child Abuse, a program of the non-profit corporation known as The American Prosecutors Research Institute, which is a subsidiary of the National District Attorneys' Association. In this position she disseminates information regarding trial techniques, and provides, as stated by her and through her publications, material to impeach and attack professionals on a "hit list" of experts who testify for the defense. This program and activity are paid for by federal money supplied by the Office of Juvenile Justice and Delinquency. The National Coalition of State Juvenile Justice Advisory Groups observed in their 1991 report to Congress, "The discretionary grant

program [of OJJDP] frequently has been the source of funds to carry out the particular ideological agenda for OJJDP Administrators" (p. 38). In the instant case it is federal tax money that is used to support efforts to attack and harm individual citizens who are attempting to criticize constructively and improve the methods used to address the fact that human beings can abuse and harm children. The Respondent's behavior demonstrates they are not concerned with improving the accuracy of decisions made by the justice system but rather only with winning cases.

Several factors arise that diminish the Respondent's claim to immunity under the "common interest privilege". One is that the National Center provides such defamatory information at conferences and by mail across the United States and in foreign countries. These conferences and mailings are not restricted to just prosecutors. They are open to the public, inclusive of lay people, defense attorneys, public organizations, and news media. In spite of a publicly proclaimed policy of assisting only prosecutors, the National Center for Prosecution of Child Abuse has sent and continues to this day to send defamatory material to private attorneys and to others who seek to attack the Plaintiffs. This information has not been provided only to those of "like" or prosecutorial interests. The only "common interest" binding together the diverse people to whom the Respondents have supplied defamatory material is the interest and intent to damage the plaintiffs.

Secondly, Toth and the National Center go even farther than would be considered acts of professional consideration by the provision of helpful information; Toth and the Center set a goal,

as stated in the Respondents own Memorandum[2] describing the National Center for the Prosecution of Child abuse and its services:

> **Likewise, the more prepared prosecutors are for expert witnesses who make their living testifying only on behalf of child molesters (and essentially adopting theories attendant to their source of income) the less effective, and less commercially desirable, the expert will be for future alleged child molester defendants.**

Respondent Memorandum, pps. 5–6 (emphasis added).

Such a statement clearly sets the *intent* of the Respondents to harm expert witnesses willing to assist a defendant. With such *intent* regarding all "expert witnesses" for "child molesters", the Respondents show that their "belief" system is not primarily based upon the individual expert whom they may believe, as they say in this instance, to be jaded, biased, or inherently evil in their eyes, but their intent is simply based on the fact that when any expert witness presents testimony and evidence on behalf of the defendant, they are to be made "commercially undesirable". Such intent and belief are not based upon individual facts but upon a preliminary judgment that the witness must be attacked by virtue of their stance in court, and not on the merits of their reputations, arguments, or

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[2] Memorandum in Support of Defendants Toth, Peters, Rose, the Center, APRI and NDAA's Motion for Rule 11 Sanctions. This document was filed with the District Court which denied the motion for Rule 11 sanctions. The defendants did not appeal this ruling. Therefore the document is not part of the Appellate Court file. If this court wants the document it is available from the District Court.

presentations. Such actions are not conducive to the provision of reliable evidence or of the introduction of scientific information to court as established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Supreme Court of the United States, No. 92-102 (filed June 28, 1993). Through unfounded personal attacks and defamation, without any accountability, it will eliminate responsible professionals from testifying in court.

Further, such intent and the continuing acts of the Respondents who, to this day, continue to distribute the material that is at issue in this matter, establishes malice. In spite of many warnings and demonstration by the Petitioners regarding the falsity of the Respondents' presentations and published materials, the continuing acts of the Respondents may establish more than "actual malice", but more precisely "express malice" through actions establishing that the defamatory information continues to be provided out of "ill will, envy, spite, (or) revenge". *See Polzin v. Hemorecht*, 54 Wis.2d 578, 587–88, 196 N.W.2d 685 (1972).

In granting a motion for a summary judgment, there must remain no issues of material fact. Whether or not "actual malice" existed in the present case was an issue of material fact which should be decided by a jury and clearly precludes the entry of summary judgment. The court made a clear factual finding in reaching its conclusion that no "actual malice" existed. For example, in its decision, the court made a factual finding on the apparent basis for the Defendants' belief relying on existence of certain literature. Yet, the Plaintiffs-Respondents had introduced other evidence in the record to counter such literature. Such evidence on the part of the Defendants did not go undisputed and thus a factual issue remained. The court also made a factual finding as to the acceptance of Plaintiffs-Respondents in the scientific community. Again, Plaintiffs-Respondents disputed the evidence set forth by the Defendants

and a factual issue remained. Taken in the light most favorable to the Plaintiffs-Respondents, a review of the record before the Appellate Court indicates a clear, unequivocal question of whether there was "actual malice" in the Defendants' actions remained.

The Appellate Court took note of documentation provided by the Defendants that indicated that the writings of the Plaintiff's were not acceptable to the medical and legal communities through written critiques by John E.B. Meyers, J.D., and David Chadwick, M.D. This was used to demonstrate the factual basis for the "belief" of the Defendants. We find it important to establish that the Court was not made aware of or did not attend to the fact that both Meyers and Chadwick belong to the American Professional Society on Sexual Abuse of Children (APSAC), along with Ms. Toth. This society meets regularly and discusses the issues of the prosecution of child sexual abuse. Chadwick, Meyers, and Toth have frequently appeared on the same programs at the conferences at which the defamatory material about plaintiffs is spread. Much of their literature expresses the same mind-set of the National Center for Prosecution of Child Abuse, and has attacked many defense-oriented witnesses, including the Petitioners in this case. There has been communication and cooperation between Salter, Chadwick, and Meyers about their criticisms of the work of the plaintiffs. While debate is healthy in that many issues are brought forward, both frivolous and factual, that allow an exchange of views and information that assist in establishing a middle-ground, we take note of Meyers' and Chadwick's close relationship to Respondent Toth in this case. They should not be thought of as unrelated, independent, or unbiased critics, and representatives of the majority of opinion in their fields.

In fact, the writings and work of Petitioners Underwager and Wakefield since 1984 have been supported through recent

research and the writings of others. Such professional supporting research, documentation, and presentations have been long cited by the Petitioners regarding accusations of child abuse, such as the therapist's involvement with the evaluation of children (Benedek, E.P. and Schetky, D.H. [1987], Problems in validating allegation of sexual abuse, Part 2, Clinical Evaluation, *Journal of the American Academy of Child and Adolescent Psychiatry,* 26[6]:916–921; Gardner, R. [1993] *True and False Cases of Child Sexual Abuse*, pp 263 –339), cases of "repressed memory" (Loftus, E. [1989], Misguided Memories; sincere distortions of reality, In J.C. Yuille (Ed.) *Credibility assessment,* pp 155–173, Loftus E. [1992],[discussant], *Multispecialty Symposium: Remembering "Repressed" Abuse: Initial Research, Theoretical analysis and Evaluation of the Claims,* presented at the Fourth Annual Meeting of the American Psychological Society, San Diego, CA June 20,1992,), suggestibility of children's recollections (Ceci, S.J. & Bruck, M. [1992] *The Suggestibility of the Child Witness: A Historic Review and Syntheses*, Ceci, S.J., Leichtman, M., & White, T. [1992] *Interviewing Preschoolers),* and cases of sexual abuse arising out of the divorce/custody context (Blush, G.J. & Ross, K.L. [1987], Sexual allegation in divorce; the SAID Syndrome. *Conciliation Courts Review,* 25(1):1–11; Gardner, R.A. [1987] *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse).* To name all who have provided input to the medical, legal, and mental health communities which supports or provide parallels to the Respondents' views on these complex issues would require lengthy documentation that would overrun this brief. What we have provided, however, is a showing that supporting documentation and research of the views held by the Petitioners holds a wealth of valid and reliable scientific information that should not be denied to any finder of fact in any court when moving to an educated, fair, and reasonable decision. The scientific evidence continues to accumulate to demonstrate

clearly that the Plaintiff's work and their position regarding accusations of child abuse is scientifically responsible and sound.

II. Law and precedent stand on the fair practice of establishing accuracy and truthfulness when impeaching an adversarial witness.

Recently, the Grand Jury of San Diego County (June 1994) made national news by their findings during their three years of investigation of the operation of that county's child-protection agencies, the district attorney's office, and law enforcement regarding child abuse cases. The last and seventh report from that Jury was scathing in its analysis of the district attorney's office in that county, so much so, that critics of the report state that it was responsible for the ouster of San Diego District Attorney Edwin Miller, who had held that post for many years. Mr. Miller was also the president of the National District Attorney's Association, and a co-founder of the National Center for the Prosecution of Child Abuse.

The Grand Jury read over 64 books, approximately 20,000 pages of transcripts, over 300 pieces of correspondence as well as numerous newspaper and magazine articles in addition to published and unpublished monographs. They heard dozens of witnesses. They also viewed 10 videotapes. The Jury found incompetence, bias, and the failure to operate under any specific doctrine or process. They noted a case (*People v. Garcia-Garcia* , 17 Cal.App.4th 1169 (1993)) which was overturned in the Court of Appeals, Fourth Appellate District, due to the failure of the District Attorney's office to reveal information bearing on the credibility and professional competence of a principal *prosecution* witness. The Jury further noted another ill-fated sexual abuse prosecution by that county , in the civil aftermath of that case, that notice is taken of allegations of failure to

disclose and lack of truthfulness on the part of a deputy district attorney as reported in the opinion of the Court of Appeals. *See James W. v. Superior Court,* 17 Cal.App.4th 245 (1993) .

Alarmed at what its finding were during this investigation, the Grand Jury noted that the U.S. Supreme Court had stated,

> *"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is* ***not that it shall win a case, but that justice shall be done.*** *As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape of innocence suffer. he may prosecute with earnestness and vigor—indeed, he should do so. But,* ***while he may strike hard blows, he is not at liberty to strike fouls ones.*** *It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."*

San Diego County Grand Jury (quoting *Berger v. United States*, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, 633 (1935) (emphasis added)).

> "The philosophy expressed applies equally to all public prosecutors.... Although the Grand Jury has observed some excellent lawyers in the District Attorney's Office, certain members of that office have become obsessed with the idea of 'winning cases'. the fact that *'it is their duty to see to it that those accused of crime are afforded a fair trial'* (*People v.*

> *Talle* 111 Cal.App.2d) has been forgotten or overlooked. Because the District Attorney's office is charged not only with pursuing and prosecuting criminals, but also with doing justice, the fine balance that must be struck is easily outweighed by overzealous prosecution. and atmosphere of conviction, and conviction only, can be expected to produce inadequate investigation, incomplete disclosure to the defense and sharp practices. The District Attorney must provide leadership to change any such attitudes in his office at the earliest possible time." *Id.*

The demand for prosecutorial competence and honesty abound in a wealth of case law and precedence across the country throughout our history, not only regarding the facts of a case but specifically dealing with attacks against the expert witnesses for the defense. In a recent New York case, *Clark v. New York City Transit Authority*, 580 N.Y.S.2d (A.D.1 Dept. 1992), held that in attacking the testimony of the expert trial counsel acted improperly as an unsworn witness when he said that the testimony of the witness was " ' false, absolutely false, and misleading'... It is error for trial counsel to bolster his case on summation by repeated accusations that witnesses on the other side are liars... It is error for trial counsel to accuse medical experts, without supporting evidence, of being willing to testify for a fee... 'is nothing but a paid expert who will say anything whatsoever without regard to what is right, without regard to what is truthful'."

In *Berkowitz v. Marriott Corporation* 163 A.D.2d 52 (N.Y. App. 1 Div. 1990), the New York Supreme court mandated a new trial regarding a personal injury lawsuit because of the plaintiff's counsel's statement, ". . . in an unfair and highly prejudicial attack upon credibility and competence of

defendant's expert witnesses . . . were repeatedly depicted as hired guns who were brought into litigation to 'fluff up the case'."

Again, we must remind the Court that in the Respondent's *Defendant's Memorandum in support of Defendants, et.al.* paragraph on page 12 clearly states that the Respondents regard *all* defense expert witnesses as hired guns. While hard blows must be struck for the advance of truth and in the seeking of justice, such blows must be based on truth, not just personal bias or subjective belief. The Respondents' actions have given faulty and defamatory information to prosecutors as well as other members of society through seminars and conferences. This information is being presented by prosecutors and others throughout the country, in court and outside of court, not for the purpose of bringing forth new information regarding evidence, but specifically to inflict malicious damage to the persona, reputation, and thus, the credibility of any defense expert witness. Such an act is not for the furtherance of justice, but the destruction of due process afforded to any defendant.

III. Deliberate, untrue, and malicious attacks upon adversarial expert witnesses, under the protection allowed in this case by the lower courts, dissuades such professionals from testifying on behalf of any defendant and will likely prevent the provision of exculpatory information to any court. The information that such experts bring into a court arena may provide reasonable doubt as to a criminal defendant's guilt, or absolution to a party in a civil action, or custody to a parent, and thus to eliminate such experts through this continued unchecked defamation or character assassination is to deny the accused due process.

This case is not dealing with the defamation of only these Petitioners; it sets a precedent for any and all future expert witnesses who testify on behalf of any defendant in child abuse cases or other cases. NASVO has had much experience with the extreme difficulty defendants have in finding expert witnesses to provide competent and valid scientific information to assist their defense. Over and over we hear the answer that scientists don't want to get involved, that their practice will suffer, their referrals drop off, and they will be attacked by other professionals. Should the District and Appellate Court decisions stand in this case, there will be open season on any professional who dares to testify on behalf of the accused. There will be no method available for the accused to mount a viable, reliable, informative, scientifically based defense through the testimony of an expert witness. The state cannot be relied upon to provide accurate and reliable scientific information through experts. The recent exposure of several prosecution experts, including a serologist. pathologists, dentists, and forensic crime labs who fraudulently present testimony, fabricate evidence, and falsify reports is noteworthy primarily because prosecutors used them for years, knowing they were suspect [3] . Forensic crime laboratories are completely unregulated and there are no standards of competency. Yet such putative, possibly unreliable, scientific testimony often has a great impact upon the finder of fact. The defense must be allowed to present reliable scientific evidence that may assist the finder of fact in properly weighing the evidence. For this reason, experts willing to assist a defendant must be able to respond effectively to false and defamatory personal attacks.

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[3] Gianelli, P. (1994) When the evidence is a matter of life and death. New York Times, Aug. 21, 1994. p. 15.

Not only do Toth and the Center regard defense experts as those "who make their living" in testifying only for the defense, but they also diminish the constitutional presumption of innocence, by declaring that such experts only testify on "behalf of child molesters", thus establishing the presumed guilt of the accused defendant. The mind-set of this statement goes beyond what is expected of a prosecutor, who, under the long-held standards set forth in *Berger v. United States,* 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, 633 (1935), must "refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." The Respondents' goal does not establish a legitimate means to provide information that can educate the courts as to either good or bad science by facts or even theory established through scientific process and provided under rules of evidence. Rather it establishes the methods of a zealot, who views any professional providing information to the courts on behalf of a defendant as unworthy, as the enemy, who must be barred from testifying by making that expert "less commercially desirable". The methods used to accomplish that goal are not to impeach the credibility of the witness through investigation, facts, and more current research, but to provide inflammatory, defamatory false information, call it factual, and then hide under the skirts of privilege and immunity.

Such acts are aimed not only at the Plaintiffs in this case, but, by the Respondents' own statements, at any "expert witnesses who make their living testifying only on behalf of child molesters". This means that should the ruling in the lower courts stand, not one expert witness for the defendant, who is to be presumed innocent until proven guilty, is safe from being publicly painted as deviant, a perjurer, a liar, dishonest, incompetent, unethical, and a "hired gun". Further, if so labeled by the prosecutors and others, the expert witness has no recourse available to correct the assault. Ironically, in child abuse cases

two distinct battles zones have been drawn in the field of science. The prosecution has its own stable of experts who never testify for the defense, and also "make a living" consulting and testifying only for the prosecution. It is becoming increasingly clear that credible scientific evidence does not support the positions of the prosecution's experts. Toth and the Center carefully avoid speaking to this fact. This is as old as the adversarial court system, and one that is accepted in our search for the provision of new information as the issues of child abuse is scrutinized in on-going research. To place a legal damper on one side or the other in the provision of such information will not lead to informed juries or courts. In this case, it is clear the Respondents' actions will support only the expert providing information that will guarantee prosecution, and by rendering defense experts "less commercially desirable", deny due process to the accused.

CONCLUSION

In this brief, *amicus* has reviewed, documented, and placed before this Court our examination of what we believe to be devastating to the equitable process of discovery, defense, analysis, and determination of facticity through the judicial process, should the decision by the lower courts in this case stand. We believe that to ignore the deliberate and malicious defamation by prosecution advocates of expert witnesses for the defense as the Respondents have done, for the express purpose of eliminating a defendant's right to produce such witnesses at trial would be the destruction of due process as we know it today. Adding to the already overwhelming power of the government by making agents of government immune from redress by ordinary citizens cannot increase the accuracy of the judgments of the justice system. It can only increase error, encourage misuse and abuse of the power of the state, and diminish the rights and freedoms of citizens

In 1692, the Reverend Cotton Mather stated at the end of the infamous Salem Witch Trials, "I would rather set ten witches free than to hang one innocent man". Unfortunately, this statement was made after many had lost their lives in trials that offered no equity, no hope, and no expert witnesses for the defense. To come forward in 1692 and proclaim the innocence of a person accused of being a witch was to be labeled as a witch yourself. Respondents demonstrate this error in Mr. Vaughn's letter refusing NASVO permission to file this brief when he refers to "Letter from your organization on behalf of child abusers". Respondents have already determined that the thousands of members of VOCAL groups represented by NASVO are guilty and are child abusers. We believe that should this case stand as decided in the lower courts, no witness for the defense is safe from a similar tyranny, and the rights of the accused in these cases will be seriously diminished.

Respectfully Submitted

M. Cristina Gutierrez
William H. Murphy, Jr. & Associates, P.A.
1007 North Calvert Street
Baltimore, MD 21202
(410) 539–6500

Attorney for Amicus Curiae,
National Association of State VOCAL Organizations, Inc.

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No. 94-314

In the

Supreme Court of the United States

October Term, 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE,
NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTOR'S RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS' ASSOCIATION.
CHARLES VAUGHAN AND JAMES PETERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL CONGRESS FOR MEN AND CHILDREN, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Travis Ballard
Counsel of Record
415 Mill Road
Adrian, Michigan 49221
(517) 263-7822

Attorney for Amicus Curiae
National Congress for Men and Children, Inc.

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CHARLES VAUGHAN AND JAMES PETERS
Respondents

On Petition for Writ of Certiorari to the
Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Congress for Men and Children, Inc., an international group of associations and organizations concerned with protecting and advancing the rights of men and children, respectfully hereby moves for leave to file the attached brief *amicus curiae*. The attorney for the plaintiffs has consented. Two attorneys for the respondents have rejected our request for their permission to file the brief. The

stated reason for both refusals is identical and is ". . .the filing of an Amicus Curiae brief by you would be primarily for political purposes and will not bring to the attention of the Court matters which will not be submitted by the parties." Mr. Vaughn refused permission claiming the action was a frivolous lawsuit.

This brief supports the plaintiffs' petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The National Congress for Men and Children, Inc. has both a long and broad experience of dealing with litigation at all levels affecting family life, children's safety and security, their development, and the appropriate and effective roles of both men and women in family and society. We believe this case represents a grave and serious potential for damage to families, children, men, and women. The state already has unparalleled power to intervene in family life and exercises that power more frequently and more intrusively than ever before in our history. It is true that the involvement of the state has an ostensible benevolent intent. Yet it is also true that government may be most feared when it is at its most beneficent. If government is to be helpful and truly supportive of family life, children, and men and women, there must be some checks and balances as the framers of our constitution recognized and built into the very fabric of our institutions.

We are also very cognizant that family life and the values of family are in a state of flux and potential change. It is not an exaggeration to consider the possibility that the traditional family has broken down and may, indeed, disappear. This appears dangerous for our nation to many. Our system of justice also already has the prosecutor firmly established as the single most powerful individual in our justice system. The pursuit of justice rests most firmly on the character and

personality of our prosecutors and other agents of government. So long as prosecutors are persons of probity, wisdom, and fairness, we may be confident that citizens will be dealt with fairly in most instances. Fairness is what American citizens most want and expect from their justice system.[1] Obedience to the law is nurtured and fostered by the belief in fairness and the actual experience of fairness.

However, in the event the weakness of humanity manifests itself in the person of a prosecutor or agent of government, there must be checks and balances to offer opportunity for accountability, control, and redress of inequity or injustice. If, in this instant case, the decision of the Seventh Circuit is allowed to stand, it is our fear and belief that one of the last, if not the last, checks and balances to hold prosecutors accountable for a proper pursuit of justice, the requirement to be truthful and fair, will be destroyed. Should this be the case, the liberties and rights of all citizens are exposed to the frailty of human character with no shield or defense.

We do not understand the objection of respondents that filing this brief is for political purposes and therefore they would deny us access to the system of justice. To deny citizens access to the court for this reason appears to be the same reasoning of King George III to deny the colonies access to parliament and thus the King's justice, requiring obedience without opportunity to speak in opposition. All appeals to the system of justice of any nation state are in the final analysis political actions. The District judge rejected the defendants's motion to find the suit a frivolous action and

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[1] Tyler, T. R. (1990). Why people obey the law. New Haven: Yale University Press.

ruled it was not, contrary to Mr. Vaughn's reason for refusing our request for permission.

For the foregoing reason, the National C gress for Men and Children, Inc. respectfully urges the Court to accept and file the enclosed brief *amicus curiae* in support of the petitioners, Ralph Underwager and Hollida Wakefield.

Respectfully submitted,

Travis Ballard
Counsel of Record
415 Mill Rd.
Adrian, MI 49221
(517) 263–7822

Attorney for *Amicus Curiae*
National Congress for Men and Children, Inc.

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NATIONAL DISTRICT ATTORNEYS' ASSOCIATION,
CHARLES VAUGHAN AND JAMES PETERS
Respondents

On Petition for Writ of Certiorari to the
Court of Appeals for the Seventh Circuit

Brief of the
National Congress for Men and Children, Inc.
as *Amicus Curiae*
in support of Petitioners

Interest of the Amicus Curiae

This *amicus curiae* brief is submitted by the National Congress for Men and Children, Inc, a coalition of over 100 organizations which support father's rights, men's rights and divorce reform in North America. The National Congress was originally formed in 1980 in Houston, TX, and now has thousands of members in the United States and Canada. It is a national nonprofit organization working to reduce gender discrimination in society and family courts. The members are primarily men, women, and their families who are struggling to maintain and increase their involvement in their children's lives and to remove cultural and legal impediments to such involvement. The mission of the National Congress for Men and Children is to serve as a national organization to assist local and state efforts compatible with the goal of assisting parents who choose to remain actively involved in their children's lives regardless of marital status. We encourage active parental involvement, including emotional and financial support by both parents. Moreover, we assert that the best interest of children demands that custody be eliminated as an issue in divorce and that the parent child relationship be severed only by a constitutionally sound proceeding, requiring clear and convincing evidence of child abuse or neglect.

Background

The Nature of the Problem

This case of *Underwager and Wakefield, Plaintiffs-Appellants v. Anna Salter, et al., Defendants-Appellees*, is not an ordinary, run-of-the-mill defamation action. It has implications and potential consequences for the entire system of justice and could, if permitted to stand as it now is with the

Seventh Circuit decision, obstruct and impede the intents and purposes of the U. S. Supreme Court evident in a number of rulings. We write because we believe, as the Brief of *Amici Curiae* of the American Society of Law, Medicine, and Ethics, et al. in the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* declared ". . .as a general matter. scientist's ability to be of assistance to judges and juries in determining a wide range of issues is threatened by the opinions of the lower courts in this case (p. 1)". If the decisions of the lower courts in this case are allowed to stand, we believe the consequence will be that scientists will not be willing to assist the justice system with scientific testimony because of the danger of grievous harm to reputation, career, and work.

As the *Amicus Curiae* Brief of the Carnegie Commission on Science, Technology, and Government in *Daubert v. Merrell Dow* stated "Recent developments both in law and science have conspired to bring increasingly complex scientific issues before the courts for resolution" (p. 2). Some of the most difficult, complex, and emotionally demanding issues the courts are dealing with, in which credible scientific knowledge is often crucial, involve the relationships between men and women and children and the state. Family law includes issues of divorce, domestic violence, custody of children, competence, adoption, birth control, and abortion. Criminal law includes sexual and physical child abuse, rape, sexual harassment, assault, and the criminalization of many sexual behaviors. Tort law now includes claims of sexual harassment and battering as a basis for overturning contracts and agreements made years before. Many states have changed statutes of limitations to permit actions based on claims of recovered repressed memories. Factual information about these issues that is reliable and trustworthy is hard to come by and consequently there is a significant danger that unsupported speculation may fill in the blanks without anyone being aware of it.

In all of these issues the testimony of scientists or other experts is often the major portion of the evidence produced by either adversary. The Federal Rules of Evidence appear to have had the effect of widening the scope and applicability of expert opinion and increasing the frequency of the use of experts in attempting to resolve very thorny and difficult disputes. The National Congress for Men and Children is deeply involved in those issues where men and children are involved in litigation of all sorts and where their rights as individuals and citizens are at issue. The members of the National Congress have had much experience dealing with inept, biased, erroneous, or ill-founded expert testimony in litigation in the areas of our concern. Therefore, we welcomed the recent (1993) *Daubert v. Merrell Dow* decision which provides guidance to the courts on admissibility of what is purported to be scientifically based testimony. We believed this decision would greatly improve the ability of the courts to separate what is scientifically sound from what is not when dealing in the areas of greatest concern to us.

Thus far some 40 cases citing *Daubert* appear to be coming down mainly on the side of excluding weak or inadequately supported testimony from being admitted. It seems likely that the Daubert decision may well result in what *Richardson* (1994) characterized as ". . .a revolution in U. S. expert evidence law." and *Underwager and Wakefield* (1993) termed a ". . .new paradigm shift for expert testimony." The intent of the Supreme Court clearly was to remove any confusion related to the Federal Rules of Evidence and the Frye test, which is now supplanted, and assure the availability to finders of fact of sound and credible scientific information.

The lower court opinions citing *Daubert* demonstrate a clear, emerging trend. The courts take their new "gatekeeper" role assigned by *Daubert* very seriously. The courts have used

Daubert to reject scientifically unsound evidence. While most of the cases have involved toxic tort and traditional tort cases, there have been several dealing with the kind of expert testimony the National Congress for Men and Children is most concerned about, that is, testimony by mental health professionals, psychiatrists, psychologists, and social workers, that is most often found in the cases dealing with the family, parent, child, and abuse and neglect issues. Testimony based on weakly supported psychological theories has been excluded. This has included recognition of suggestibility in child abuse cases so hypnotically refreshed testimony has been excluded. The use of post-traumatic stress disorder and the child abuse accommodation syndrome to buttress, by inference, claims of prior abuse has also been excluded by a *Daubert* analysis. We welcome this development of case law recognizing the *Daubert* decision and rejoice in the seriousness with which the judiciary appears to be addressing its new role as the gatekeeper for what is admissible as scientific evidence.

Another Supreme Court ruling that is of interest here is *Ake v. Oklahoma* (470 U. S. 68, 105 S. Ct. 1087, 84.L.Ed. 2d 53 (1985)) in which the decision establishes that it is the right of a defendant to have competent mental health expertise available to aid in the defense against an accusation. This decision and subsequent application in case law suggests a more active role for the expert in consulting with the defense and supporting the defendant's claims than is often understood (*Rachlin*, 1988). The decision, for all practical purposes, establishes the model for mental health professionals involvement in criminal trials (*Applebaum*, 1987). The constitutional right to effective assistance of counsel includes "effective aid in preparation and trial of the case. "(*Powell v. Alabama*, 287 U. S. 45, 71 (1932). The use of experts to assist in the preparation of a defense falls squarely within the right of counsel (*United States v. Theriault*, 440 F.

2d 713 (5th Cir. 1971) cert. den. 411 U. S. 984 (1973); *United States v. Curant*, 545 F. 2d 823, 829 (2nd Cir. 1976). The *Ake* court grounded its due process analysis on concepts of equal justice and equal protection (*Lee*, 1992).

The Supreme Court has also recognized a constitutional duty in the area of disclosure. There are two separate and distinct potentials for prosecutorial abuses, using false testimony and suppression of exculpatory evidence. The second, suppression of exculpatory evidence, is an issue involved in the instant case. However, in *Imbler v. Pachtman* (424 U. S. 409 (1976)), the majority noted that it is a distinction which "is not susceptible to practical application" (at 431, *n.* 34.). In *U. S. v. Agurs*, (427 U. S. 97 (1976) the Supreme Court described the level of materiality required of evidence before its suppression reaches constitutional dimensions as the creation of "a reasonable doubt that did not otherwise exist"(at 112). Scientific evidence that meets the requirements of *Daubert*, when offered by a defendant, will always be intended to support a reasonable doubt and may often engender reasonable doubt when offered to the finder of fact and understood. Behavior by prosecutors and adversaries which results in either a trial decision based upon defamatory and false impeachment that excludes scientific expert evidence or unavailability of experts because of the high risks involved in testifying when subjected to unlimited defamatory attacks is therefore a violation of the constitutional rights involved in disclosure and suppression of exculpatory evidence.

In *New Jersey v. Michaels* (136 N.J. 299, 642 Atlantic Reporter, 2nd, 1372) the New Jersey Supreme Court accepted the responsibility to ensure reliability of evidence admitted at trial. "That concern implicates principles of constitutional due process. 'Reliability (is) the linchpin in determining

admissibility' of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment. (*Manson v. Braithwaite*, 432 U.S. 98, 114, 97, *S. Ct.* 2243, 2253, 53, L.Ed.2nd 140 154 1977). Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived freom unreliable sources due process interests are at risk" (p. 1380). The Court finds that the investigation and the therapy of the children so contaminates the evidence that it requires a taint hearing if the defense can demonstrate a substantial likelihood that adult influence has affected statements by children and imposes a burden of proof on the State to show the statements are reliable enough to be admitted. The Court details the ". . .egregious prosecutorial abuses" (p. 1385) and illustrates them with summaries of several interviews. In demonstrating the need for a taint hearing and in rebutting a State's claim of reliability a defendant must have the assistance of a competent mental health scientist and be able to present scientifically sound testimony. To be prevented from doing so would be a violation of due process. Therefore defamatory personal attacks on experts and improper and false impeachment tactics, of necessity, involve this constitutional issue.

In the issues the National Congress attempts to deal with involving the most intimate and basic of human relationships, the family, and the level and nature of state intrusions into the family, the most primitive and atavistic emotions of all those involved are elicited. This imposes a special burden on prosecutors and other agents of the state to aim at the highest levels of reason and responsibility. A prosecutor is prohibited from seeking convictions at any price. The prosecutor is viewed as a "minister of justice" whose obligation is to guard the rights of the accused as well as to enforce the rights of the

public. The prosecutor is held to an even higher standard in sexual abuse cases due to the inherently emotional reactions evoked in such cases (*State v. Danielson*, 377 N. W. 2d 606 (Minn. App. 1985); *State v. Jahnke*, 353 N. W. 2d. 606 611 (Minn App. 1984)). The same expectation of increased awareness of the level of emotional involvement can be deemed necessary for all adversaries seeking to use our system of justice to resolve these most difficult and complex cases. The judiciary also must take into account the different nature of legal disputes arising out of the nature of family life and the intimacies therein. The importance of resolution of disputes in this area is vital to the welfare of any nation state. This was expressed by St. Augustine centuries ago.

"The union of male and female is the seed-bed, so to speak, from which the city must grow. . .Since, then, a person's home ought to be the beginning or elementary constituent of the city, and every beginning serves some end of its own, and every part serves the integrity of the whole of which it is is a part, it follows clearly enough that domestic peace serves civic peace, that is, that the ordered agreement of command and obedience among those who live together in a household serves the ordered agreement of command and obedience among citizens." (Augustine, *The City of God*, 15,16,19,13.)

Summary of Argument

The core issue in this case is the defamation of expert witnesses by the prosecution and other adversary attorneys. In the instant case, there is no disagreement about the defamation of the plaintiffs by the defendants. Twice Judge Shabaz, District Court, observed that the actions of the defendants were defamatory as fact and as law. Twice the

decision of the Appellate Court describes the behavior of the defendants as defamatory.

> "Like the district court we shall assume that at least some of the statements are untrue and defamatory. Cf. *Moldea v. New York Times Co.*, 15 F3d 1137 (D. C. Cir. 1994). Affidavits offered in opposition to the motion for summary judgment create a material dispute on the truth of the statements. (p. 5). . . the fact that both Salter and Toth have continued publishing the defamatory statements. Salter's monograph remains in circulation and she continues to pass out copies of the *Mr. Bubbles* tape. Toth frequently lectures on the subject of child molestation and she continues to use the *Mr. Bubbles* tape as part of her presentation (p.10)."

There is no dispute that the defendants continue to publish the defamatory statements after the initiation of the law suit and, indeed, up to the present moment. They continue to advertise and distribute their defamamatory material to this very day. The defendants continue to maintain their posture of belief that the statements are true in the face of the disconfirming evidence supplied by the plaintiffs and their own admissions that what they claim has been said by the plaintiffs has not been said.

Nevertheless, the district and appellate courts have ruled that the heightened standard of actual malice of New York Times for media defendants is applicable.

> "A person who concludes that a public figure is a knave may shout that conclusion from the mountain tops. Both Salter and Toth came to

> believe that Underwager is a hired gun who makes a living by deceiving judges about the state of medical knowledge and thus assisting child molesters to evade punishment.. Persons who hold such opinions cannot be expected to look kindly on their subjects, and the law certainly does not insist that they shut up as soon as they are challenged (p. 10)."

However, does this include teaching and distributing untrue and defamatory material about an expert witness to prosecutors and others who then bring it into the courtroom and use it in the effort to impeach experts?

If the the *New York Times* standard of actual malice is extended to include attorneys, scholars, and others who teach prosecutors and adversary attorneys to impeach experts in the courtroom by falsehood, innuendo, and lies, and the proof of actual malice can be defeated by a defendant simply asserting, "I believed it to be true," the effect on the process of justice is devastating. It can only greatly increase the level of error in judicatory decisions. The effect of this decision is to give a hunting license to the government and to any adversary to attack by any means, fair or foul, any experts who may have scientific data and knowledge which, for whatever reason, the government or adversary does not find convenient. It raises the power of the office of prosecutor to an absolute level for it removes any possibility of accountability for redress if zealotry or blind ambition lead to excesses.

The suggestion by the *Imbler* majority that abuse of prosecutorial immunity can be deterred by the criminal analogue of § 1983, 18, U. S. C. §242 is unrealistic. This is shown by the fact that there are only a few reported cases of 18 U. S. C. § 242 being used against a prosecutor. The

difficulty in persuading a prosecutor to prosecute a colleague is self-evident. The potential of an ethical reprimand is just as uncertain as a criminal sanction. Disciplinary committees must deal with legal standards of materiality and subjective interpretations of due process cannot be the basis for ethical sanctions. There is no feasible source of accountability for a decision to suppress evidence helpful to a defendant (*Beatty, M. L.* (1981). The ability to suppress exculpatory evidence: Let's cut off the prosecutor's hands. *Idaho Law Review*, 17, 237–248.) If permitted to stand the Seventh Circuit decision in the instant case removes the last possibility for any redress or any consequence for behavior which is clearly wrong. There is no way this would not lead to an increase in abuse of the power of the prosecutorial office and the position of adversary. The certain outcome of that is greater and more frequent injustice.

There will be fewer and fewer scientists willing to take the abuse and suffer the assault to their reputations in order to assist in the defense of a citizen charged with a crime of any sort. This outcome is all the more likely because the defendants have made their purpose crystal clear in their Memorandum in Support of Defendants Toth, Peters, Rose, the Center, APRI and NDAA's Motion for Rule 11 Sanctions. On pages 5–6 of this Memorandum the defendants describe the National Center for Prosecution of Child Abuse and its services. They claim the Center is nonprofit and provides a necessary service for prosecutors to assist them to prepare for dealing with experts the defense presents. Then they include this paragraph:

> **"Likewise, the more prepared prosecutors are for expert witnesses who make their living testifying only on behalf of child molesters (and essentially adopting theories attendant to their**

source of income) the less effective, and less commercially desirable, the expert will be for future alleged child molester defendants (p. 6)."

This, together with their publication of a "hit list, as Toth termed it, with fifty names of persons they label defense experts, demonstrates the conviction that anyone who opposes them is a pure mercenary and they intend to damage them financially.

Finally, the only scientific experts appearing in the courtroom will be those who maintain whatever line the government has determined suits its purposes. At that point, rather than the solid scientific knowledge which the *Daubert* decision aims at, there is likely to be a variant of Lysenkoism. Trofim Lysenko, in the Soviet Union in the 1930s, promoted a theory of genetics assuming the inheritance of acquired characteristics. This concept was favored by the state because it permitted the false hope of the new Soviet man and woman rising to ever more faithful service to the state. Lysenko enjoyed a few years of fame and fortune as a lionized servant of the state. The effect on the nation, however, was to cripple severely the agricultural economy and destroy scientific genetics in the Soviet Union for years.

In the specific area the National Congress is most concerned with, family life, the effect would be to foster unscientific, unsupported, and erroneous views which can masquerade as science in the courtroom. The scientific approach of the plaintiffs is generally accepted in the scientific community. This fact is demonstrated in articles such as *Ceci & Bruck*, 1993, *Kassin, Ellsworth, & Smith*, 1989, and the plethora of recent research which supports the understanding that claims of child abuse must be dealt with very cautiously if they are uncorroborated. Across a broad

area the most recent research is accumulating to demonstrate that what the plaintiffs wrote in their 1988 book is correct and supported more and more strongly.[1]

The end result of this process of prosecutors and adversaries attacking and defaming expert witnesses who offer scientific facts contrary to received wisdom is to defeat the interest of this Court in having reliable scientific knowledge available in the courtroom and to deny to those persons on the politically incorrect side of any controversial issue due process, equal justice, and equal protection. It is to encourage and support the most vulnerable and seductive side of the role of prosecutor, the corruption of absolute power with no accountability and no controls.

We strongly urge this court to consider the overall effect of extending the heightened standard of actual malice to prosecutors in the courtroom and in their attacks on expert witnesses outside the courtroom. It is not too much to require

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[1] The prosecution and the child protection system has locked itself into supporting and advancing assertions that are now shown to be unfounded, These include concepts popularly understood, such as children cannot lie, or do not lie, about sexual abuse. Children cannot talk about things they have not experienced. Child abuse, including sexual abuse, is an epidemic. The state can provide adequate safety and care of children. Children should always be raised by mothers. Children are no more suggestible than adults. Children cannot be led to produce false central details of events that did not happen. Children can be questioned by adults repeatedly in a leading and coercive fashion but still produce spontaneous and reliable statements. Most people who interview children do not use leading and suggestive approaches. Domestic violence is a gender problem and men are the ones who do violence to women. Claims of recovered repressed memories of childhood abuse are true. Even if you do not remember you were abused, that is evidence you were, and if you feel like it, then you have been.

that all the persons involved in the courtroom in the search for justice play by the same rules. When every witness is required to swear an oath ". . .to tell the truth, the whole truth, and nothing but the truth" to exempt the prosecutor or adversary from the simple, plain duty to be truthful and accurate in statements, implications, and innuendo cannot advance the cause of justice nor aid in making the most accurate decisions possible. To permit and encourage irrational, dogmatic, and erroneous attacks on scientific knowledge in the courtroom and to have no way to control such attacks is to defeat the nature and purpose of science.

If it should be that the court determines the heightened standard of New York Times is applicable, in the alternative, we strongly encourage the court to establish that republication of defamatory material after suit is evidence of actual malice. This would be in keeping with the opinion of this court regarding ". . .persistent conduct after suit. . ." in *Farmer v. Brennan*, 128 Lawyers Edition, 2nd, 811. In the instant case, after suit, Toth republished the defamatory videotape thirteen (13) times in ten states. The APRI National Center for Prosecution of Child Abuse continues to this day to send out and publish the defamatory material of Salter's monograph. They continue to send material to anybody who asks for information to harm the plaintiffs, not just to prosecutors as their policies claim.

It is true, as the appellate court's ruling reads, that "Scientific controversies must be settled by methods of science rather than by the methods of litigation (p. 11)." However, scientific methodology does not include defamation, character assassination, nor asserting falsehood to be truth. It does not include private publication and private circulation of false and defamatory attacks upon other scientists. If a non scientific party, which consumes science,

can be involved in the doing of science and introduce falsehood into the practice of science with great power and authority, the capacity for mischief is incalculable. Therefore we urge this court to accord to scientific experts who are willing to enter the adversarial system to provide scientific knowledge nothing more than the ordinary recourse open to all other citizens—the opportunity in our system of justice to demonstrate and establish for a jury of their peers their probity, veracity, and truthfulness if challenged and attacked.

Argument

I. There is ample case law and precedent establishing a standard of accuracy, fairness, and truthfulness in attempting to impeach an adversaries expert witnesses and refusal to permit innuendo or implications of some form of wrong doing to be used to deny a defendant a fair trial.

The most frequent attack made on an expert is that of being a "hired gun" who testifies in whatever way the payee wants. The Supreme Court of Michigan (*Michigan v. Tyson* (1985), Supreme Court of Michigan, Docket No. 73774, Calendar No. 25. 377 N.W.2d 738 (Mich. 1985) ruled that a "prosecutor's statements . . . to the effect that the defendant's psychiatric expert had testified only because he was paid to do so, was misconduct so prejudicial that it denied defendant a fair trial" (p. 745) . . . "was not cured . . . and therefore reverse defendant's conviction" (p. 746).

A Michigan appellate court (*Shemman v. American Steamship Company* (1979). Court of Appeals of Michigan, Docket No. 77-2239. Mich.-App., 280 N.W.2d 852) ruled that "improper innuendoes" about expert witnesses constitute a "studied purpose to prejudice the jury and divert the jurors'

attention from the merits of the case" (p. 857). "Witnesses should not be subjected to personal attacks and unsubstantiated insinuations. Each party is entitled to present its case on the merits, free from remarks of opposing counsel which may prejudice the jury and divert its attention from the real issues" (p. 858). The court then ruled that the "cumulative effect of the improper arguments and innuendoes . . . was so highly prejudicial that we conclude defendant was denied a fair trial" (p. 859). When jurists recognize the serious impact of such implications on the effort to do justice, it cannot be that the claim these are mere opinions has merit or can be sustained.

The New York State Human Rights Appeal board (*Taormina, C. v. Goodman, S. S.* (1978). No. 406 N.Y.S.2nd 350. Supreme Court, Appellate Division, Second Department.) held "For example, at one point counsel stated that one of defendant's experts was known in the community as 'here come Howie' and implied that he would offer any testimony which might be desired for a price. . . We believe, that standing alone, the cumulative effect of these improper remarks would require a new trial." (p. 352)

Although the Supreme Court of North Carolina did not hold it to be prejudicial error, it did observe (*State v. Rosier, H. W.* (1988). No. 331A86. Supreme Court of North Carolina) that an implication that an expert witness was paid ". . .need not imply that he would not testify truthfully." Therefore, the remarks by the prosecutor were not prejudicial enough to warrant reversal. The Supreme Court of New Jersey (*State v. Rose, T.* (1988). No. 112 N.J. 454. Supreme Court of New Jersey) reversed the death penalty because of the improprieties of the prosecutor during the opening and closing remarks in the sentencing phase. The remarks included implications that the expert was told by defense counsel how

to testify, The Illinois appellate court (*State v. Coulter, D.* (1992). No. 1-87-3175. Appellate Court of Illinois First District, First Division. held that when the state attacked the honesty of defendant's expert witness, an attorney cannot insinuate that a witness is untruthful because he is paid by the opposing party. In *Stamos, P. J., Perlin, J. & Hunter, M. L. v. Sukkar, F.* ((1982). N. 482-0054. Appellate court of Illinois, Fourth District) the court observed "Illinois courts have taken a dim view of counsel impugning the integrity of physicians testifying as expert witnesses. . .a parallel was suggested between the TV character in "Have Gun Will Travel" and the doctor who has 'medical testimony will travel'. . .These remarks were clearly improper, , , Counsel went beyond merely noting compensation and its implications as to his credibility, to suggesting he was a 'professional witness'. . . and a 'hired gun' ."

The Supreme Court of Nevada (*Sipsas, W. v. State* (1986). No. 14927. Supreme Court of Nevada.)went a bit further in determining that a prosecutor's remarks, even though defense counsel did not object, were so ". . . prejudicial as to require court intervention *sua sponte* to protect the defendant's right to a fair trial. The prosecutor ". . .notwithstanding the rules of professional conduct prescribed under Supreme Court Rule 188(4) the prosecutor expressed the following vituperative remarks during closing argument: 'Now that brings us to [sic] Dr. Jindrich. The Hired Gun from Hot Tub Country. Have stethoscope, will travel. . . .I think Dr. Jindrich is a living example of Lincoln's law. You can fool all of the people enough of the time.' " The conviction for first degree murder and child abuse was reversed and a new trial required. The New York Supreme Court (*Berkowitz, E. et. al. v. Marriott Corporation* (1990). No. 163 A.D. 2nd 52. Supreme Court, Appellants Division, First Department.) mandated a new trial in an action for damages for personal injuries because of

plaintiff's counsel's remarks ". . .in an unfair and highly prejudicial attack upon credibility and competence of defendant's expert witnesses. . .were repeatedly depicted as hired guns who were brought into litigation to'fluff up the case'." In *Clark, R. v. New York City Transit Authority.* (1992). No. 580 N.Y.S.2nd (AD. 1 Dept.). Supreme Court, Appellate Division, First Department) held that in attacking the testimony of the expert trial counsel acted improperly as an unsworn witness when he said that the testimony of the witness was "'false, absolutely false, and misleading'. . . It is error for trial counsel to bolster his case on summation by by repeated accusations that witnesses on the other side are liars. . . It is error for trial counsel to accuse medical experts, without supporting evidence, of being willing to testify for a fee. . . 'is nothing but a paid expert who will say anything whatsoever without regard to what is right, without regard to what is truthful' "

In another case (*People v. Rodriguez,* N. Y. L. J., 192:1 August 17, 1984) the appellate court censured the prosecutor for repeatedly resorting to ridicule and sarcasm in order to impeach the the credibility of the defense's psychiatric expert witness. "Do you always diagnose people as crazy based on this type of guesswork, Dr.? . . .Doctor, is it a symptom of some form of psychosis when a man can't answer a straightforward yes or no question? . . .Let's hear it, Doctor. Run through your routine." The Florida Supreme Court (*Nowitzke, F. v. State* (1990). N. 71729. Supreme Court of Florida.) ruled that "It is improper to impeach an expert witness by eliciting from another witness what he thinks of that expert. . . 'A trial should not be turned into a debate on irrelevant and immaterial issues such as the reputation of one expert witness as determined or judged by the personal opinion of another expert witness for the other side.' The introduction of Dr. Szasz' opinion was clearly erroneous. It also violated

Nowitzke's constitutional right to confront witnesses [Szasz was not a witness and absent]."

The quotation above, from the Defendants' Memorandum in Support of Defendants Toth, Peters, Rose, the Center, APRI and NDAA's Motion for Rule 11 Sanctions, p. 5–6, makes it clear that the attitude of the defendants is that all defense expert witnesses are "hired guns" and that their intent is to harm them.

The oft quoted dictum "He may prosecute with earnestness and vigor—indeed, he should do so. But while he [the lawyer] may strike hard blows, he is not at liberty to strike foul ones" (*Berger v. United States*, 295 U. S. 78 (1935)) expresses simply what should be the standard for dealing with expert witnesses. Anyone who willingly and voluntarily goes into the adversarial world of the courtroom can accept hard blows but fair and deal with it. That is not the problem. It is the foul blows that cannot be canceled or overcome. It is the untruthfulness that is spread about through gossip and through workshops and seminars and writing that cannot be countered or responded to in any effective manner that will have the effect of depriving defendants of adequate expert scientific assistance and thus deny them a fair trial. There should not be any greater latitude allowed outside the courtroom than in it. If falsehood and defamation are spread about outside the courtroom, it will find its way inside at some point.

II. Depriving the defendant of the right to have qualified experts to assist in presenting the defendant's version of the facts denies him or her due process under the law.

Effective deprivation of the right to qualified expert assistance can come about through indirect actions that make it impossible or very difficult. The right to have expert assistance, as this court has defined it, is an empty right with no substance if the rightful assistance is not available. This is the effect of the attacks of prosecutors on experts even now without the hunting license afforded by the appellate decision in the instant case. A survey of experts in child sexual abuse cases (*Underwager, Wakefield, Legrand, Bartz, & Erickson*, 1986) demonstrated that mental health experts who testify for the defense in cases of alleged sexual abuse of children share similar experiences. With one exception, every respondent reported being isolated, criticized, characterized as hired guns, and targeted for slander and innuendo. There were efforts to blacklist them, interfere with referrals, cancel their classes and workshops, cut off funding sources for research projects, and, in one instance, deliberate dissemination of the false claim of a homosexual relationship with the defendant. One respondent testified for the first time for a defendant. The consequence was that his office was picketed by angry adults claiming he was supporting pedophiles. That was his first and last time.

Every respondent but one also reported observing instances of prosecutorial misconduct ranging from simply withholding exculpatory evidence to breaking in to a judge's office and rifling his files which resulted in his being removed from the case (*Wakefield & Underwager*, 1988). It is not simply a matter of venal or unethical prosecutors. Rather it is the nature of the role of prosecutor itself that generates the greatest pressure to misconduct. The prosecutor can never be wrong. He or she must believe that every person whom they prosecute is guilty since they cannot work for the conviction of an innocent person. This pressure is omnipresent because it is built into the system. The pressure will be strongest in the

self-righteous prosecutor and everything in the justice system compels the prosecutor to believe in the rightness of the cause (Jonakait, R. N. (1987). The ethical prosecutor's misconduct. *Criminal Law Bulletin*, 23(6), 1987).[2]

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, 410 U. S. 284, 294, 93, S. Ct.. 1038, 1045 1973). To deprive an accused of the ability to present witnesses in his own behalf is to subject him to a trial that is so fundamentally unfair as to deprive him of the due process guaranteed by the Fourteenth Amendment of the Federal Constitution. See *Washington v. Texas*, (388 U. S. 16, 19, 87, S Ct. 1920, 1923, 1967) "The right to present the defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies . . .is a fundamental element of due process."

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[2] According to law professor, Gideon Kanner, ". . .deception, nastiness, intimidation, and general lack of civility among lawyers are increasingly permeating the litigation process . . . In the real world trickery succeeds all to often . . . Lawyers are by and large neither stupid nor irrational. They do what they think will help their case and what they think judges will let them get away with. . . When judges don't care enough about the ethical quality of the litigation process to deal with outright misconduct effectively, there is little hope. . . It is therefore indefensible for judges to wash their hands of problems and let the litigation process seek its lowest tolerable level. That is nothing short of a surrender to the barbarians among us. . . Judges ask that we pay homage to them by rising when they enter a courtroom and by addressing them as 'Your Honor.' Judges are the only officials in our government who can summarily imprison citizens for being rude in their presence. To justify these prerogatives, judges owe us something in return. At a minimum they owe us a fair hearing, untainted by tolerance of abuse, intimidation, and deception., They owe us – you should pardon the expression – justice." (Kanner, G. (1991, September). Rambo, go home: Of ethics, tactics, and judges. *Trial*, pp. 104–106.)

Our system of justice requires a complete presentation of the relevant facts. The Supreme Court has stated:

> "We have elected to employ an adversary system of justice in which all parties contest before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecutor or by the defense." *United States v. Nobles*, 422 U. S. 226, 230-231, 45 L. Ed. 2d. 141, 149, 92, S. Ct. 2160, 2166 (1975), quoting *United States v. Nixon*, 418 U. S. 683, 709, 41 L. Ed. 2d 1039, 1064, 94, S. Ct. 3090, 3108, (1974).

Given that the right to present evidence is a fundamental one, the state must show that it has a compelling interest in extending the heightened requirement of actual malice to attorneys and scholars that overcomes the defendant's rights. Thus far the only interest the Seventh Circuit decision describes is the pocketbook and/or purse of the scholars and prosecutors. After claiming that media companies ". . .reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business . . ."(p. 8), the appellate court goes on to opine that "Psychologists compiling monographs with the aid of research grants, and prosecutors seeking to augment one

side's arsenal for trial, do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants" (p. 8). Silencing defamatory attacks, decreasing the level of falsehood, increasing the fairness of the process, and supporting accuracy in decision making is exactly what case law about improper and proper impeachment is about. It is what all of defamation law is about. Surely a defendant facing long term or even life imprisonment, loss of children, destruction of family, impoverishment and bankruptcy, destruction of career, loss of friends, social isolation and hostile, judgmental attitudes from society for all of life is not likely to feel fairly treated when the wealth and comfort of attorneys and scholars is valued above his rights and liberty interests.

III. There is sufficient repetition of the pattern of improper attacks upon scientists and expert witnesses by prosecutors, attorneys, and their allied scholars and interference in the normal conduct of science to warrant grave concern. The repeated behavior pattern justifies maintaining, at the very least, the last possibility for redress available to a scientist who believes an unfair attack has been made. That is access to defamation law and the distinction between media defendants and non media defendants so that attorneys and scholars are not given the heightened standard of New York Times of requiring actual malice.

Nature, (Anderson, C. (1991). DNA fingerprinting discord. *Nature*, 345, 500.) one of the oldest and foremost scientific journals in the world, published in the U. K., reported on the behaviors of American prosecutors, FBI officials, and their allied scholars, to interfere with scientific

publication, peer review, and intimidate and harass defense experts who were critical of DNA techniques in forensic settings. When DNA experts Lewontin and Hartl had an article critical of using DNA probabilities in forensic settings accepted for publication by *Science*, prosecutors attempted to intimidate and frighten them in several phone calls, then tried to get the article suppressed and coerced the editor of *Science* to publish hastily a non peer reviewed rebuttal by two scientists allied with the prosecution. The prosecution also elicited false and misleading testimony from Dr. Daiger and Dr. Caskey who concealed their grants from the Department of Justice to study DNA. Both grants were to study the very issues the defense was criticizing which would have falsified the prosecutions claim that the questions were resolved. These examples demonstrate the power of the government to shape and mold scientific testimony. These efforts to interfere in the procedures of science and harass experts were confirmed by *Science* (Roberts, L. (1991). Fight erupts over DNA fingerprinting. *Science*, 254, 1721–1723).

Further extensive efforts to intimidate and harass DNA experts were reported by Kolata (Kolata, G. (1991, December 20). Critic of DNA tests tells of pressure to withdraw. *New York Times*, A16). Foreign scientists have had their visas questioned, threatened with imprisonment, and prosecutors have attempted to discredit their work with false claims of misrepresentation and flawed procedures, much as in the instant case. In one instance, a scientist was falsely accused of fraud in his billing practices. Dr. W. Thompson, UC Irvine, spoke of an unethical pattern of intimidation aimed at scientists. He sees that when the prosecutors cannot attack the science, they attack the person. "So the prosecutors are telling the courts that the critics are unethical, that they are charlatans, that they are bad" (*Kolata*, 1991, p. A16). One scientist who is critical of DNA forensic use, reports he was

threatened with having a rumor spread that he is a closet homosexual.

In addition to intimidating and harassing experts, prosecutors use the ability to dispense research funding to support research expected to be favorable. The Director of the National Institute for Justice routinely solicits advice from the FBI before awarding forensic science research. An FBI representative participated directly in the external review process in which grants were awarded to two DNA scientists who later falsely testified they had no connection with the prosecution and no grants. This false testimony was knowingly elicited by the prosecution (*U.S.A. v. Stephen Yee, et al.* (1991). Motion for new trial.)

> "The conduct of the government in this matter, particularly the actions of AUSA Wooley, constitutes an unlawful and unethical effort to intimidate defense witnesses, retaliate against them for their testimony and their scientific opinions, and to tamper with their most precious tangible property, their scholarship. . .What must be stressed, however, is that the government's misconduct here . . .is not isolated event, or just the ill considered, impetuous action of an overzealous prosecutor in the heat of battle. . .The attempt to prevent, alter, and undermine publication of the article by Drs. Hartl and Lewontin was part of a broad national campaign by federal and state law enforcement officials to intimidate, harass, and deter expert witnesses from testifying against the FBI and other forensic DNA laboratories and publishing their views. . .By far the most troubling aspect of the government's campaign is its direct interference in the publication and peer review

process where an effort is being made to prevent and undermine the publication of scientific opinions law enforcement does not like" (pp. 24–25).

In a review of 8000 criminal jury trials Kalven and Zeisel (Kalven, H. & Zeisel, H., 1966. *The American Jury*. Boston, Little Brown) report that scientific evidence of every kind save one was far more frequently offerred by the prosecution than by the defense. The single exception was psychiatric testimony in an insanity defense. *Saks* (1989) reports that 80% of the nation's crime laboratories are located within police agencies. This suggests that an even higher proportion of forensic science is carried out within and paid for out of police agency budgets. He considers this to be grounds for serious concern about undue command or cultural influence on forensic science and concludes that "The neutral fact finding norms of science are incompatible with the crime fighting culture of police agencies"(p. 788). A review of a National Institute of Justice custom search of Federal Criminal Justice Research Data Base for all federally funded research grants using the index terms Child Abuse, Abused Children, Abusing Parents, and Prediction produced over 500 grants. Every one was clearly prosecution oriented. This finding demonstrates the powerful way in which government can affect the scientific enterprise.

It is firmly founded case law that where a conviction is obtained through the use of false evidence, due process has been denied. It makes no difference whether the prosecutor actually knew the testimony was false or should have known it was false (*Miller v. Pate*, 386 U. S. 1 (1967); *Chapman v. California*, 386 U. S. 18 (1967); *Napue v. Illinois*, 360 U. S. 264 (1959); *Giglio v. United States*, 405, U. S. 150 (1972). Where the prosecutor knows or should have known the testimony was false, the conviction should be set aside if

without it the jury *might* have reached a different conclusion. (*Wright, Federal Practice and Procedure*, Criminal 2d, Section 557.1; Gordon v. United States, 178 F. 2d. 896, 900, (6th Cir. 1949), *cert denied* 339 U. S. 935.) The standard, "might have reached a different conclusion is far less demanding than "will probably produce an acquittal." It is a fully logical extension of this principle to apply it to prosecutorial use of false impeachment material to induce a jury to discount defense expert witness testimony. If a prosecutor knows or should have known that material used to impeach a defense expert was false but goes ahead and uses it, the jury might well have reached a different decision without the use of fraudulent material. The right to due process has been denied the defendant when such a practice is followed.

Kolata (1991) reports that many scientists say they will no longer testify because it is simply too stressful. The Carnegie Commission on Science, Technology, and Government report underlying the Daubert brief contains data showing most scientists will not get involved in testifying in court (*Gallagher, S. G.* Personal communication, June 19, 1994). In a survey of forensic psychiatrists (N = 408), Miller, (1985; The harassment of forensic psychiatrists outside of court. *Bulletin of the American Academy of Psychiatry and the Law*, 13(4), 337–343) reports that 43 % of all harassment was committed by judges and attorneys, 19% of the threats of actual physical harm, and 14% of the actual physical attacks. This is an alarming level of unethical harassing behavior by judges and attorneys. Winfree (1987)(Winfree, L. T. (1987). All that glitters is not necessarily gold: Negative consequences of expert witnessing in criminal justice. *P. Anderson & L. Winfree* (Eds.). *Expert Witness* (pp. 138–153). Albany, New York, State University of New York Press) report a study of the consequences to experts of testifying in

the criminal justice system. The conclusion is that experts ". . .put more than just their professional reputations in jeopardy. . . . A sizeable minority—between 22.2 percent and 29.3 percent—reported problems ranging from minor harassment to major reprisals. . ." in their work and home communities. Winfree further concludes ". . . Citing any of the above reasons for not wanting to get involved is to abandon the judicial system to perhaps the less competent expert who will practice a somewhat questionable brand of social science" (p. 153). The Board of the National Association of Criminal Defense Lawyers has expressed concern about the great difficulty in finding experts willing to testify in DNA cases and capital cases. In the McMartin case in California, the defense had to go to England to get Dr. D. Paul to testify after Dr. Robert ten Bensel, University of Minnesota, was so intimidated and harassed by the prosecution that he withdrew as an expert (*Buckey, et al.*, 1990). If the efforts of prosecutors, attorneys, and allied scholars succeed in sharply limiting the number and quality of scientific expert opinion available to a defendant, here, too, the right to due process is being denied, albeit indirectly, but nevertheless quite effectively.

Conclusion

In this brief, *amicus* has explored the consequences of extending the heightened requirement of New York Times for demonstration of actual malice to non media defendants who defame and attack defense experts. We believe the consequences will be disastrous for this court's purpose to have solid and credible scientific knowledge available to the justice system as evidenced in the *Daubert* decision. We believe the consequences will be to deny to a defendant access to competent mental health professionals as this court defined the right in *Ake*. We believe the consequences will be harmful

to the venture of science if the government's efforts to shape and mold scientific inquiry to suit its purposes are not checked. We believe the consequences will be to deny constitutional rights of due process to defendants, We believe these consequences can be avoided by the simple act of allowing expert witnesses the same level of redress and protection from defamation as all other citizens have.

For these reasons the Court should clarify the standard to be used in determining the level of malice required for non media defendants in defamation actions. The Court should also clarify the impact of republication of defamatory material after suit in relationship to the standard of actual malice.

Respectfully submitted,

Travis Ballard
Counsel of Record
415 Mill Rd.
Adrian, MI 49221
(517) 263–7822

Attorney for *Amicus Curiae*
National Congress for Men and Children, Inc.